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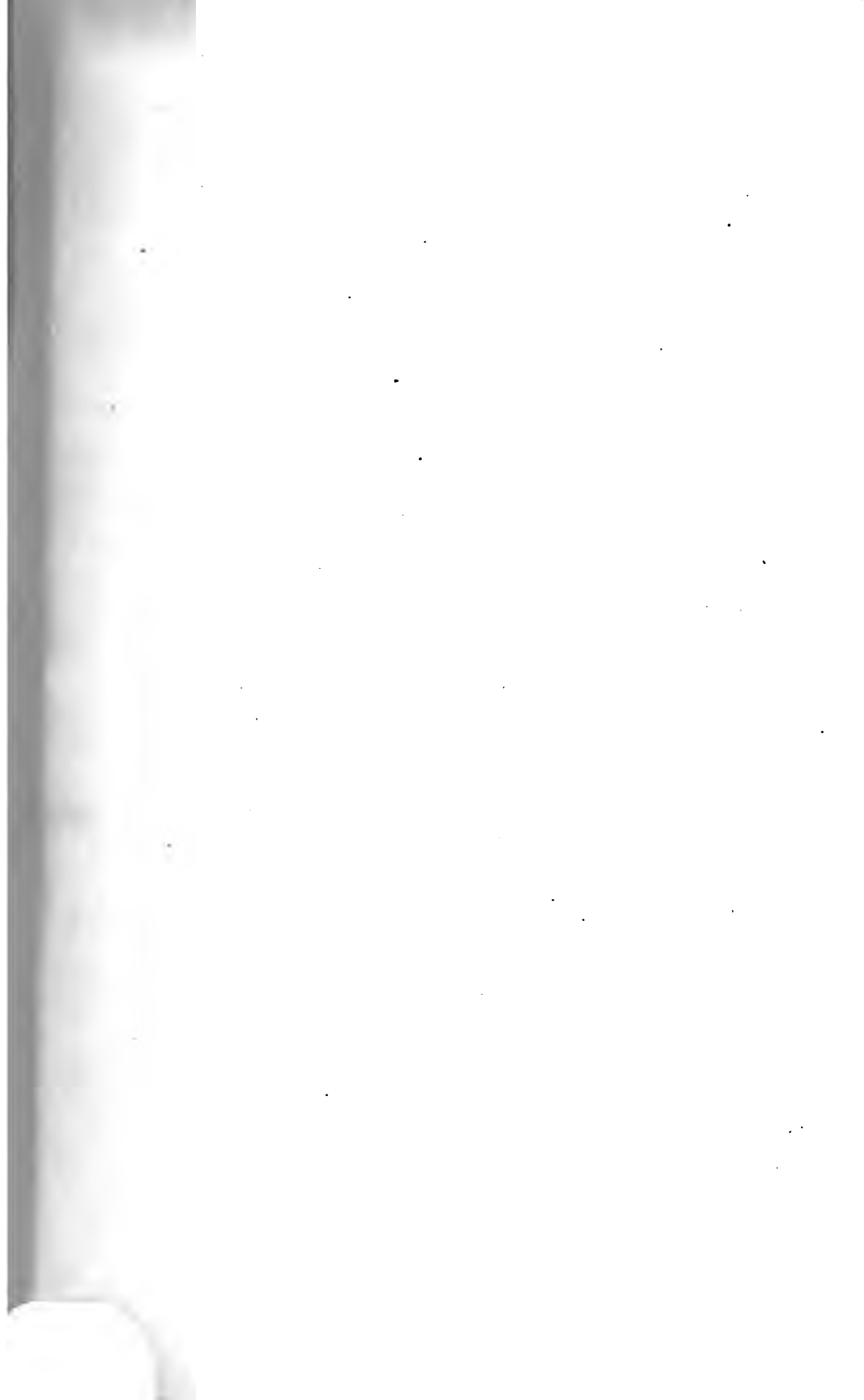
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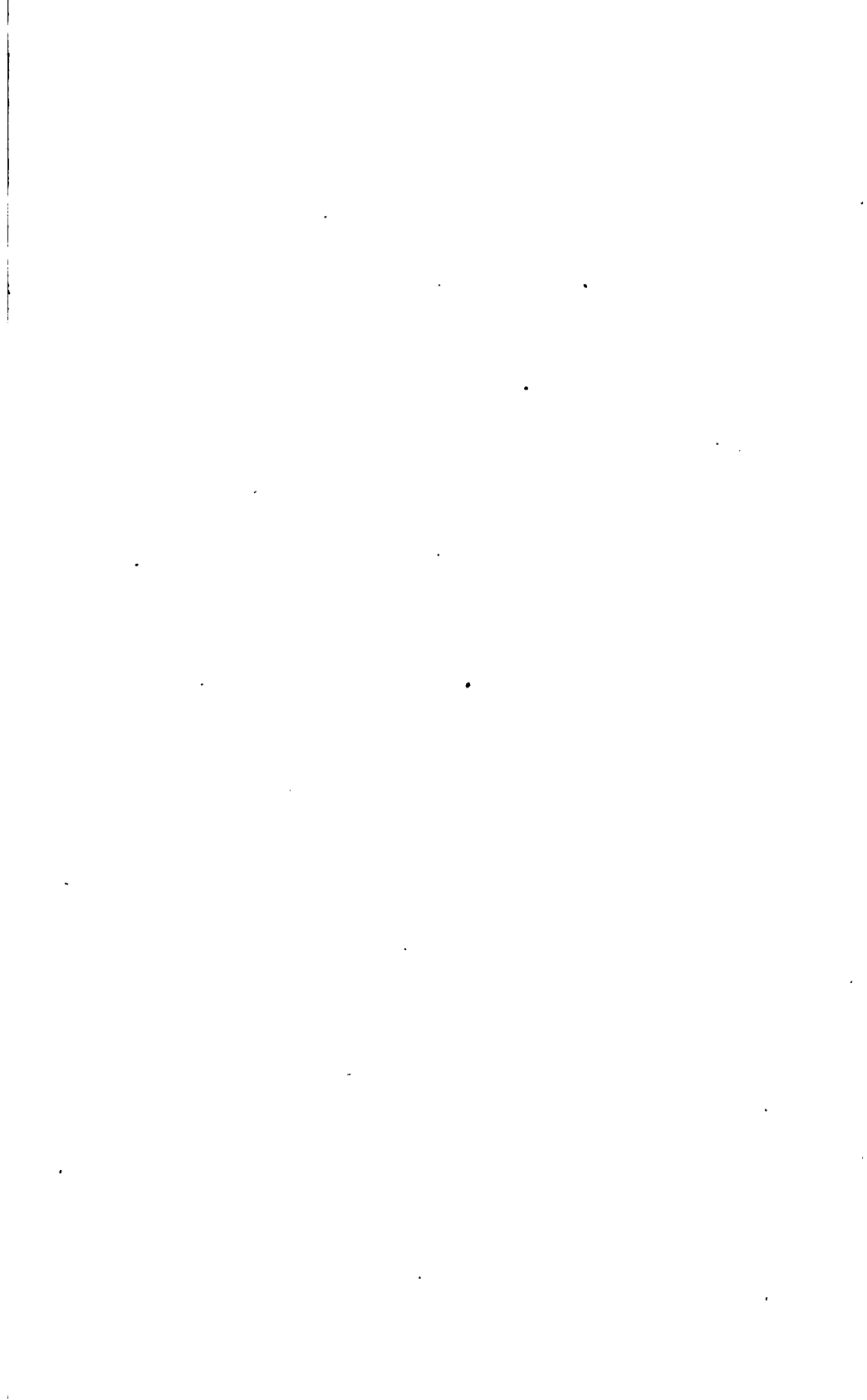
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RAILROAD REPORTS

(Vol 38 American and English
Railroad Cases, New Series)

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS J. MICHIE.

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TABLE OF CASES

Alabama & V. R. Co. <i>v.</i> Boyles (Miss.)	431
Alexander & Edgar Lumber Company, McKivergan <i>v.</i> (Wis.)	372
American Express Company and R. M. Coffin <i>v.</i> State of Iowa (U. S.)	268
American Express Co., Bank of Irwin <i>v.</i> (Iowa)	245
American Trading Co., North Pacific Railway Co. <i>v.</i> (U. S.)	744
Atchison, T. & S. F. Ry. Co. <i>v.</i> Davis (Kan.)	354
Atchison, T. & S. F. Ry. Co., Sprague <i>v.</i> (Kan.)	471
Atchison, T. & S. F. R. Co. <i>v.</i> Thomas (Kan.)	647
Atlanta & W. P. R. Co. <i>v.</i> Lovelace (Ga.)	150
Atlantic Coast Line R. Co., Hilton Lumber Co. <i>v.</i> (N. C.)	729
Atlantic Coast Line R. Co., State ex rel. Ellis <i>v.</i> (Fla.)	286
Augusta Brokerage Co. <i>v.</i> Central of Georgia Ry. Co. (Ga.)	4
Augusta Ry. & Electric Co. <i>v.</i> Smith (Ga.)	16
Bagley, Central of Georgia Ry. Co. <i>v.</i> (Ga.)	172
Baile, Virginia & S. W. R. Co. <i>v.</i> (Va.)	795
Baldwin Tp. <i>v.</i> Baltimore & O. R. Co. (Penn.)	134
Baltimore Belt R. Co. <i>v.</i> Sattler (Md.)	80
Baltimore & O. R. Co., Baldwin Tp. <i>v.</i> (Penn.)	134
Baltimore & O. R. Co., Deck <i>v.</i> (Md.)	340
Baltimore & O. R. Co., Harold <i>v.</i> (C. C. A.)	303
Baltimore & O. R. Co., National Bank of Bristol <i>v.</i> (Md.)	206
Bank of Irwin <i>v.</i> American Express Co. (Iowa)	245
Birdwell, St. Louis Southwestern R. Co. <i>v.</i> (Ark.)	57
Birmingham Ry., Light and Power Co. <i>v.</i> Brantley (Ala.)	191
Boston Elevated Ry. Co., Welch <i>v.</i> (Mass.)	725
Boston & M. R. R., Faulkner <i>v.</i> (Mass.)	217
Boston & M. R. Co., Fisher <i>v.</i> (Me.)	297
Bosworth <i>v.</i> Union R. Co. (R. I.)	9
Bottoms <i>v.</i> Seaboard Air Line Ry. (N. C.)	443
Boyles, Alabama & V. R. Co. <i>v.</i> (Miss.)	431
Brantley, Birmingham Ry., Light and Power Co. <i>v.</i> (Ala.)	191
Brinkmeier <i>v.</i> Missouri Pac. Ry. Co. (Kan.)	349
Brooklyn Heights, R. Co., O'Reilly <i>v.</i> (N. Y.)	716
Budd <i>v.</i> Camden Horse R. Co. (N. J.)	116
Burns, Kansas & C. P. Ry. Co. <i>v.</i> (Kan.)	132
Burns <i>v.</i> Pennsylvania R. Co. (Penn.)	196
Camden Horse R. Co., Budd <i>v.</i> (N. J.)	116
Camden Interstate Ry. Co., Mannon <i>v.</i> (W. Va.)	312
Camden Interstate Ry. Co. <i>v.</i> Smiley (Ky.)	94
Canadian Pac. Ry. Co. <i>v.</i> Elliott (C. C. A.)	621
Carpenter <i>v.</i> Chicago, R. I. & P. Ry. Co. (Ia.)	465
Central of Georgia Ry. Co., Augusta Brokerage Co. <i>v.</i> (Ga.)	4
Central of Georgia Ry. Co. <i>v.</i> Bagley (Ga.)	172
Central of Georgia Ry. Co. <i>v.</i> McWhorter (Ga.)	470
Central of Georgia Ry. Co. <i>v.</i> Morris (Ga.)	391
Charleston & W. C. R. Co., McDaniel <i>v.</i> (S. C.)	794
Chesapeake & O. R. Co. <i>v.</i> Commonwealth (Ky.)	288
Chesapeake & O. Ry. Co. <i>v.</i> Smith (Va.)	241
Chicago, Burlington & Quincy Railroad Company, Union Stock Yards Company <i>v.</i> (U. S.)	200
Chicago, B. & Q. R. Co., Fielding <i>v.</i> (Neb.)	769
Chicago, B. & Q. R. Co., Hawley <i>v.</i> (C. C. A.)	810
Chicago, B. & Q. R. Co. <i>v.</i> Sevcek (Neb.)	185
Chicago City Ry. Co. <i>v.</i> Lannon (Ill.)	735
Chicago, I. & L. Ry. Co. <i>v.</i> City of Crawfordsville (Ind.)	112
Chicago & M. Electric Ry. Co. <i>v.</i> Ullrich (Ill.)	405
Chicago, M. & St. P. Ry. Co., Smith <i>v.</i> (Wis.)	180

Chicago & N. W. Ry. Co., Knickel <i>v.</i> (Wis.)	453
Chicago & N. W. Ry. Co., Pierson <i>v.</i> (Ia.)	332
Chicago, R. I. & P. Ry. Co., Carpenter <i>v.</i> (Ia.)	466
Chicago, R. I. & P. Ry. Co. <i>v.</i> O'Donnell (Neb.)	135
Chicago Union Traction Co. <i>v.</i> Hanthorn (Ill.)	19
Chicago Union Traction Co. <i>v.</i> Olsen (Ill.)	49
Chicago & W. I. R. Co. <i>v.</i> Newell (Ill.)	706
City of Crawfordsville, Chicago, I. & L. Ry. Co. <i>v.</i> (Ind.)	112
Clark, Western & A. R. Co. <i>v.</i> (Ga.)	440
Commonwealth, Chesapeake & O. R. Co. <i>v.</i> (Ky.)	288
Conine <i>v.</i> Olympia Logging Co. (Wash.)	387
Coolidge, St. Louis, I. M. & S. Ry. Co. <i>v.</i> (Ark.)	713
Covetts, Louisville, H. & St. L. Ry. Co. <i>v.</i> (Ky.)	63
Covington-Cincinnati Elevated R. & Transfer & Bridge Co., Shade's Adm'r <i>v.</i> (Ky.)	183
Coyer, Pennsylvania Co. <i>v.</i> (Ind.)	218
Crandall, St. Louis & N. A. R. Co. <i>v.</i> (Ark.)	837
Chretien <i>v.</i> New Orleans Rys. Co. (La.)	262
Culver <i>v.</i> South Haven & E. R. Co. (Mich.)	806
Dagnall <i>v.</i> Southern Ry. Co. (S. Car.)	59
Dallas Rapid Transit Co. <i>v.</i> Payne (Tex.)	23
Davis, Atchison, T. & S. F. Ry. Co. <i>v.</i> (Kan.)	354
Deck <i>v.</i> Baltimore & O. R. Co. (Md.)	340
Deck, Steiner <i>v.</i> (Md.)	340
Denver & R. G. R. Co. <i>v.</i> Gunning (Col.)	842
Detroit Citizens' St. Ry. Co., McKernan <i>v.</i> (Mich.)	406
Detroit United Ry., McVean <i>v.</i> (Mich.)	464
Dotta <i>v.</i> Northern Pac. Ry. Co. (Wash.)	146
DuBose <i>v.</i> Louisville & N. R. Co. (Ga.)	727
Durham Traction Co., Hester <i>v.</i> (N. C.)	830
Elliott, Canadian Pac. Ry. Co. <i>v.</i> (C. C. A.)	621
Erie R. Co., Ihrig <i>v.</i> (Penn.)	159
Erie R. Co., Russell <i>v.</i> (N. J.)	699
Fair Haven & W. R. Co., Röhloff <i>v.</i> (Conn.)	154
Faul <i>v.</i> N. Jersey St. Ry. Co. (N. J.)	694
Faulkner <i>v.</i> Boston & M. R. R. (Mass.)	217
Fearns <i>v.</i> New York Cent. & H. R. R. Co. (Mass.)	814
Fielding <i>v.</i> Chicago, B. & Q. R. Co. (Neb.)	769
Fisher <i>v.</i> Boston & M. R. Co. (Me.)	297
Fisher <i>v.</i> Seaboard Air Line Ry. Co. (Va.)	683
Ft. Wayne & S. W. Traction Co., Mordhurst <i>v.</i> (Ind.)	123
Ft. Wayne Traction Co. <i>v.</i> Hardendorf (Ind.)	738
Fremont, E. & M. V. R. Co. <i>v.</i> Hagblad (Neb.)	226
Garvey <i>v.</i> Rhode Island Co. (R. I.)	30
Georgia C. & N. Ry. Co. <i>v.</i> Hutchins (Ga.)	727
Georgia Home Ins. Co., Yazoo & M. V. R. Co. <i>v.</i> (Miss.)	766
Gilbert, Metropolitan St. Ry. Co. <i>v.</i> (Kan.)	428
Great Northern Ry. Co., Lesch <i>v.</i> (Minn.)	770
Great Northern Ry. Co., Swartz <i>v.</i> (Minn.)	790
Gregory <i>v.</i> Wabash R. Co. (Ia.)	457
Griffin <i>v.</i> Interurban St. Ry. Co. (N. Y.)	718
Gunning, Denver & R. G. R. Co. <i>v.</i> (Colo.)	842
Hagblad, Fremont, E. & M. V. R. Co. <i>v.</i> (Neb.)	226
Hanthorn, Chicago Union Traction Co. <i>v.</i> (Ill.)	19
Hardendorf, Ft. Wayne Traction Co. <i>v.</i> (Ind.)	738
Harold <i>v.</i> Baltimore & O. R. Co. (C. C. A.)	303
Harrington <i>v.</i> Iowa Cent. Ry. Co. (Iowa)	97
Harris, Seaboard Air Line <i>v.</i> (Ga.)	285
Haverhill & A. St. Ry. Co., Tozier <i>v.</i> (Mass.)	238
Hawley <i>v.</i> Chicago, B. & Q. R. Co. (C. C. A.)	810
Hayes <i>v.</i> New York, N. H. & H. R. Co. (Mass.)	369
Head, Illinois Cent. R. Co. <i>v.</i> (Ky.)	283
Helm <i>v.</i> Missouri Pac. Ry. Co. (Mo.)	324
Henry & McNeil, St. Louis I. M. & S. Ry. Co. <i>v.</i> (Ark.)	786
Hester <i>v.</i> Durham Traction Co. (N. C.)	830

TABLE OF CASES

V

Hilton Lumber Co. v. Atlantic Coast Line R. Co. (N. C.)	729
Holland v. Seaboard Air Line Ry. Co. (N. C.)	787
Hoine, Southern Ry. Co. v. (Ga.)	427
Hutchins, Georgia C. & N. Ry. Co. v. (Ga.)	727
Ihrig v. Erie R. Co. (Penn.)	159
Illinois Cent. R. Co. v. Head (Ky.)	283
Illinois Cent. R. Co. v. Jolly (Ky.)	375
Illinois Cent. R. Co., Manning v. (Ky.)	178
Illinois Cent. R. Co., People ex rel. Roche v. (Ill.)	825
Illinois Cent. R. Co. v. Smith (Miss.)	293
Indianapolis St. Ry. Co. v. Johnson (Ind.)	445
Interurban St. Ry. Co., Griffin v. (N. Y.)	718
Interurban St. Ry. Co., Scudder v. (N. Y.)	718
Iowa Cent. Ry. Co., Harrington v. (Iowa)	97
Jevons v. Union Pac. R. Co. (Kan.)	679
Johnson, Indianapolis St. Ry. Co. v. (Ind.)	445
Johnson, W. O. v. Southern Pacific Company (U. S.)	274
Jolly, Illinois Cent. R. Co. v. (Ky.)	375
Joyce, United States Express Company v. (Ind.)	315
Kansas City-Leavenworth R. Co. v. Langley (Kan.)	433
Kansas & C. P. Ry. Co. v. Burns (Kan.)	132
Kendrick v. Seaboard Air Line Ry. (Ga.)	175
Kirchner v. Oil City St. R. Co. (Pa.)	711
Knickel v. Chicago & N. W. Ry. Co. (Wis.)	453
Lake Erie & W. R. Co. v. McFall (Ind.)	407
Lake Shore & M. S. Ry. Co., Morgan v. (Mich.)	675
Langley, Kansas City-Leavenworth R. Co. v. (Kan.)	433
Lanning, Southern Ry. Co. v. (Miss.)	1
Lannon, Chicago City R. Co. v. (Ill.)	735
Lassiter v. Raleigh & G. R. Co. (N. C.)	629
Lellyett, Louisville & N. Terminal Co. v. (Tenn.)	498
Lesch v. Great Northern Ry. Co. (Minn.)	770
Lewis, Louisville & N. R. Co. v. (Ala.)	440
Lockwood Mfg. Co., Southern Ry. Co. v. (Ala.)	306
Loftis, Pennsylvania Co. v. (Ohio)	850
Louisville, H. & St. L. Ry. Co. v. Covetts (Ky.)	63
Louisville & N. R. Co., DuBose v. (Ga.)	727
Louisville & N. R. Co. v. Lewis (Ala.)	440
Louisville & N. R. Co. v. Smith (Ala.)	597
Louisville & N. Terminal Co. v. Lellyett (Tenn.)	498
Lovelace, Atlanta & W. P. R. Co. v. (Ga.)	150
McDaniel v. Charleston & W. C. R. Co. (S. Car.)	794
McFall, Lake Erie & W. R. Co. v. (Ind.)	407
McKenna, Wisconsin & M. Ry. Co. v. (Mich.)	119
McKernan v. Detroit Citizens' St. Ry. Co. (Mich.)	400
McKivergan v. Alexander & Edgar Lumber Company (Wis.)	372
McVean v. Detroit United Ry. (Mich.)	464
McWhorter, Central of Georgia Ry. Co. v. (Ga.)	470
Madisonville Traction Company, Appt. v. Saint Bernard Mining Company (U. S.)	99
Manning v. Illinois Cent. R. Co. (Ky.)	178
Mannon v. Camden Interstate Ry. Co. (W. Va.)	312
Meridian Light & Ry. Co., Rosenbaum v. (Miss.)	835
Metropolitan St. Ry. Co. v. Gilbert (Kan.)	428
Metropolitan St. Ry. Co., Redmon v. (Mo.)	248
Middlesex & Somerset Traction Co., Peterson v. (N. J.)	672
Miller v. Southern Ry. Co. (S. C.)	33
Missouri Pac. Ry. Co., Brinkmeier v. (Kan.)	349
Missouri Pac. Ry. Co., Helm v. (Mo.)	324
Moran Bolt & Nut Mfg. Co., Ozark & C. Cent. R. Co. (Ark.)	784
Mordhurst v. Ft. Wayne & S. W. Traction Co. (Ind.)	122
Morgan v. Lake Shore & M. S. Ry. Co. (Mich.)	675
Morris, Central of Georgia Ry. Co. v. (Ga.)	391
Mugg & Dryden, Texas & P. Ry. Co. v. (Tex.)	763
Murphy v. North Jersey St. Ry. Co. (N. J.)	14

Nashville, C. & St. L. R. Co., <i>Whitlow v.</i> (Tenn.)	357
National Bank of Bristol <i>v.</i> Baltimore & O. R. Co. (Md.)	206
Nevada, C. & O. Ry., <i>Powell v.</i> (Nev.)	168
Newby, Pennsylvania Co. <i>v.</i> (Ind.)	190
Newell, Chicago & W. I. R. Co. <i>v.</i> (Ill.)	706
New Orleans Rys. Co., <i>Chretien v.</i> (La.)	262
New Orleans Terminal Co. <i>v.</i> Teller (La.)	64
New York Cent. & H. R. R. Co., <i>Fearns v.</i> (Mass.)	814
New York, N. H. & H. R. Co., <i>Hayes v.</i> (Mass.)	369
New York, N. H. & H. R. Co. <i>v.</i> O'field (Conn.)	76
New York, N. H. & H. R. Co., <i>Peterson v.</i> (Conn.)	772
New York, N. H. & H. R. Co., <i>Snow v.</i> (Mass.)	47
New York, N. H. & H. R. Co., <i>Vincent Bros. v.</i> (Conn.)	587
Northern Pacific Railway Co. <i>v.</i> American Trading Co. (U. S.)	744
Northern Pac. Ry. Co., <i>Dotta v.</i> (Wash.)	146
Northern Pac. Ry. Co., <i>Woods v.</i> (Wash.)	365
North Jersey St. Ry. Co., <i>Faul v.</i> (N. J.)	694
North Jersey St. Ry. Co., <i>Murphy v.</i> (N. J.)	14
North Jersey St. Ry. Co., <i>Vrooman v.</i> (N. J.)	393
Norwich Ins. Co. <i>v.</i> Oregon R. Co. (Ore.)	141
O'Donnell, Chicago, R. I. & P. Ry. Co. <i>v.</i> (Neb.)	135
O'field, New York, N. H. & H. R. Co. <i>v.</i> (Conn.)	76
Ohio River R. Co., <i>Ulh v.</i> (W. Va.)	608
Ohio River R. Co., <i>Richards v.</i> (W. Va.)	607
Oil City St. R. Co., <i>Kirchner v.</i> (Pa.)	711
Olsen, Chicago Union Traction Co. <i>v.</i> (Ill.)	49
Olympia Logging Co., <i>Conine v.</i> (Wash.)	387
Oregon R. Co., <i>Norwich Ins. Co. v.</i> (Ore.)	141
O'Reilly <i>v.</i> Brooklyn Heights R. Co. (N. Y.)	716
Ozark & C. Cent. Ry. Co. <i>v.</i> Moran Bolt & Nut Mfg. Co. (Ark.)	784
Panhandle Traction Co., <i>Wellsburg & S. L. R. Co. v.</i> (W. Va.)	631
Parks, Toledo, St. L. & W. R. Co. <i>v.</i> (Ind.)	397
Patterson <i>v.</i> Pittsburg, C. C. & St. L. Ry. Co. (Penn.)	469
Payne, Dallas Rapid Transit Co. <i>v.</i> (Tex.)	25
Pennsylvania Co. <i>v.</i> Coyer (Ind.)	218
Pennsylvania Co. <i>v.</i> Loftis (Ohio)	850
Pennsylvania Co. <i>v.</i> Newby (Ind.)	190
Pennsylvania Railroad Company, Western Union Telegraph Company <i>v.</i> (U. S.)	479
Pennsylvania R. Co., <i>Burns v.</i> (Pa.)	196
People ex rel. Roche <i>v.</i> Illinois Cent. R. Co. (Ill.)	823
Peterson <i>v.</i> Middlesex & Somerset Traction Co. (N. J.)	672
Peterson <i>v.</i> New York, N. H. & H. R. Co. (Conn.)	772
Pierson <i>v.</i> Chicago & N. W. Ry. Co. (Ia.)	332
Pittsburg, C. C. & St. L. Ry. Co., <i>Patterson v.</i> (Pa.)	469
Pittsburg, O. V. & C. R. Co., <i>Rodefer v.</i> (Ohio)	815
Powell <i>v.</i> Nevada, C. & O. Ry. (Nev.)	168
Quantz <i>v.</i> Southern Ry. Co. (N. C.)	259
Raleigh & G. R. Co., <i>Lassiter v.</i> (N. C.)	629
Redmon <i>v.</i> Metropolitan St. Ry. Co. (Mo.)	248
Rhode Island Co., <i>Garvey v.</i> (R. I.)	30
Richards <i>v.</i> Ohio River R. Co. (W. Va.)	607
Rideout <i>v.</i> Winnebago Traction Co. (Wis.)	416
Riegler's Adm'r, South Covington & C. St. Ry. Co. <i>v.</i> (Ky.)	256
Rodefer <i>v.</i> Pittsburg, O. V. & C. R. Co. (Ohio)	815
Rohloff <i>v.</i> Fair Haven & W. R. Co. (Conn.)	154
Rosenbaum <i>v.</i> Meridian Light & Ry. Co. (Miss)	835
Russell <i>v.</i> Erie R. Co. (N. J.)	699
St. Bernard Mining Company, Madisonville Traction Company, Appt. <i>v.</i> (U. S.)	99
St. Louis, I. M. & S. Ry. Co. <i>v.</i> Coolidge (Ark.)	713
St. Louis, I. M. & S. Ry. Co. <i>v.</i> Henry & McNeil (Ark.)	786
St. Louis & N. A. R. Co. <i>v.</i> Crandall (Ark.)	837
St. Louis Southwestern Ry. Co. <i>v.</i> Birdwell (Ark.)	57
St. Louis Southwestern Ry. Co., <i>West v.</i> (Mo.)	855

Sattler, Baltimore Belt R. Co. v. (Md.).....	80
Savage v. Southern Ry. Co. (Va.).....	151
Schutz v. Union Ry. Co. of N. Y. City (N. Y.).....	777
Scudder v. Interurban St. Ry. Co. (N. Y.).....	718
Seaboard Air Line Ry., Bottoms v. (N. C.).....	443
Seaboard Air Line Ry. Co., Fisher v. (Va.).....	683
Seaboard Air Line Ry. v. Harris (Ga.).....	285
Seaboard Air Line Ry. Co., Holland v. (N. C.).....	787
Seaboard Air Line Ry., Kendrick v. (Ga.).....	175
Seaboard Air Line Ry. Co., Spencer v. (N. C.).....	656
Sentell v. Southern Ry. (S. Car.).....	161
Sevcek, Chicago, B. & Q. R. Co. v. (Neb.).....	185
Shade's Adm'r v. Covington-Cincinnati Elevated R. & Transfer & Bridge Co. (Ky.).....	183
Smiley, Camden Interstate Ry. Co. v. (Ky.).....	94
Smith, Augusta Ry. & Electric Co. v. (Ga.).....	16
Smith, Chesapeake & O. Ry. Co. (Va.).....	241
Smith v. Chicago, M. & St. P. Ry. Co. (Wis.).....	180
Smith, Illinois Cent. R. Co. v. (Miss.).....	293
Smith, Louisville & N. R. Co. v. (Ala.).....	597
Snow v. New York, N. H. & H. R. Co. (Mass.).....	47
South Covington & C. St. Ry. Co. v. Riegler's Adm'r (Ky.).....	253
Southern Pacific Company, W. O. Johnson v. (U. S.).....	274
Southern Ry. Co., Dagnall v. (S. Car.).....	59
Southern Ry. Co. v. Horine (Ga.).....	427
Southern Ry. Co. v. Lanning (Miss.).....	1
Southern Ry. Co. v. Lockwood Mfg. Co. (Ala.).....	306
Southern Ry. Co., Miller v. (S. Car.).....	33
Southern Ry. Co., Quantz v. (N. Car.).....	259
Southern Ry. Co., Savage v. (Va.).....	151
Southern Ry. Co., Sentell v. (S. Car.).....	161
Southern Ry. Co., Walker Bros. v. (N. Car.).....	690
South Haven & E. R. Co., Culver v. (Mich.).....	806
South Orange & M. Traction Co., Wheeler v. (N. J.).....	52
Spencer v. Seaboard Air Line R. Co. (N. Car.).....	658
Sprague v. Atchison, T. & S. F. Ry. Co. (Kan.).....	471
State of Iowa, American Express Company v. (U. S.).....	263
State ex rel. Ellis v. Atlantic Coast Line R. Co. (Fla.).....	286
Steiner v. Deck (Md.).....	340
Suffolk & C. Ry. Co. v. West End Land & Improv. Co. (N. C.).....	602
Swartz v. Great Northern Ry. Co. (Minn.).....	790
Swearingen, Texas & Pacific Railway Company v. (U. S.).....	378
Teller, New Orleans Terminal Co. v. (La.).....	64
Texas & Pacific Railway Company v. Swearingen (U. S.).....	378
Texas & P. Ry. Co. v. Mugg & Dryden (Tex.).....	763
Thomas, Atchison, T. & S. F. R. Co. v. (Kan.).....	647
Toledo, St. L. & W. R. Co. v. Parks (Ind.).....	397
Tozier v. Haverhill & A. St. Ry. Co. (Mass.).....	238
Ulh v. Ohio River R. Co. (W. Va.).....	608
Ullrich, Chicago & M. Electric Ry. Co. v. (Ill.).....	405
Union Pac. R. Co., Jevons v. (Kan.).....	679
Union R. Co., Bosworth v. (R. I.).....	9
Union Ry. Co. of N. Y. City, Schutz v. (N. Y.).....	777
Union Stock Yards Company of Omaha v. Chicago, Burlington & Quincy Railroad Company (U. S.).....	200
United States Express Company v. Joyce (Ind.).....	315
Vincent Bros. v. New York, N. H. & H. R. Co. (Conn.).....	587
Virginia & S. W. Ry. Co. v. Bailey (Va.).....	795
Vrooman v. North Jersey St. Ry. Co. (N. J.).....	393
Wabash R. Co., Gregory v. (Ia.).....	457
Walker Bros. v. Southern Ry. Co. (N. C.).....	690
Welch v. Boston Elevated Ry. Co. (Mass.).....	725
Wellsburg & S. L. R. Co. v. Panhandle Traction Co. (W. Va.).....	631
West End Land & Improv. Co., Suffolk & C. Ry. Co. v. (N. C.).....	603
West v. St. Louis Southwestern Ry. Co. (Mo.).....	895

Western & A. R. Co. <i>v.</i> Clark (Ga.).....	440
Western Union Telegraph Company <i>v.</i> Pennsylvania Railroad Company (U. S.).....	479
Wheeler <i>v.</i> South Orange & M. Traction Co. (N. J.).....	52
Whitlow <i>v.</i> Nashville, C. & St. L. R. Co. (Tenn.).....	357
Winnebago Traction Co., Rideout <i>v.</i> (Wis.).....	416
Wisconsin & M. Ry. Co. <i>v.</i> McKenna (Mich.).....	119
Woods <i>v.</i> Northern Pac. Ry. Co. (Wash.).....	365
Yazoo & M. V. R. Co. <i>v.</i> Georgia Home Ins. Co. (Miss).....	766

RAILROAD REPORTS

SOUTHERN RY. CO. *v.* LANNING.

(Supreme Court of Mississippi, Dec. 21, 1903.)

[35 So. Rep. 417.]

Carriers of Passengers—Failure to Stop at Flag Station—Signal to Stop—Punitive Damages.

Where the testimony left it uncertain as to whether the engineer of a train saw a signal to stop at a flag station, and there was no proof that other employees saw the signal, an instruction that, if the engineer or other employees saw the signal to stop, and their failure to stop the train was either willful or capricious, punitive damages might be imposed, was erroneous.

Same—Same—Punitive Damages—Instruction.

An instruction that, if the engineer of a train saw a signal to stop at a flag station, and the failure to stop was either willful or capricious on his part, punitive damages might be imposed, was erroneous for failing to state that the engineer understood the signal.

Same—Same—Same—Same.

An instruction, in an action against a railway company for failing to stop a train at a flag station, that if the acts of defendant's servants were characterized by willfulness or capriciousness punitive damages might be awarded, was erroneous for failing to state what acts were referred to and what servants were meant.

Same—Same—Same—Same.

Where, in an action against a railroad company for failure to stop a train at a flag station, the evidence showed that the only signal to stop was made by a third person, an instruction submitting the question whether plaintiff signaled the train, and charging that if the train was signaled by a third person, and if the servants of the company saw, or by the exercise of ordinary care might have seen, plaintiff's signals, plaintiff should recover, was erroneous, as calculated to confuse the jury.

Same—Same—Signal to Stop—Punitive Damages.*

Where the engineer and fireman in charge of a train, through no fault of their own, fail to see or obey a signal to stop at a flag station, the company will not be liable for failure to stop the train; while, if they fail to see the signal because of negligence on their part, the person damaged is entitled to recover compensatory damages; and if the signal is seen and understood by them, and their action in not stopping the train is malicious, wanton, or capricious, then punitive damages may be recovered.

Appeal from Circuit Court, Alcorn County; E. O. Sykes, Judge.

*As to the right to recover punitive or exemplary damages for wrongs to passengers, see foot-note appended to *Steedman v. South Carolina & G. E. R. Co.* (S. Car.), 9 R. R. R. 627, 32 Am. & Eng. R. Cas., N. S., 627, where all the preceding authorities in this series are collected.

As to the damages recoverable for refusal or failure to carry a passenger, see foot-note appended to *Schmidt v. Cleveland, etc., Ry. Co.* (Ky.), 12 R. R. R. 149, 35 Am. & Eng. R. Cas., N. S., 149, where all the preceding authorities in this series are collected.

Southern Ry. Co. v. Lanning

Action by J. R. Lanning against the Southern Railway Company to recover damages for failure to stop a train at a flag station when signaled to stop. From a judgment for plaintiff, defendant appeals. Reversed.

The evidence for plaintiff was that defendant's train was scheduled to stop at Glen, a flag station on its road, when signaled by those desiring to take passage thereon; that plaintiff, who was a physician, lived at Corinth, and was at Glen's station January 31, 1902, and desired to board this passenger train for his home; that one Fields took a piece of wrapping paper two or three feet long and signaled, but the train did not stop; that he began signaling just after the signal for the station was sounded, and continued to flag until it was almost upon him, when the engineer again sounded the whistle, but did not stop the train; that it was light enough for them to see a man for a quarter of a mile down the track; that the roads between Glen's station and Corinth were in bad condition and the waters high, which prevented plaintiff from traveling the dirt road to Corinth, and he was compelled to walk to Corinth about eight miles, part of the way in the rain. The engineer of the train testified, for defendant, that it was his duty to sound the call and be on the watchout for signals in approaching a flag station; that he sounded the call for signals about a half mile from the station, but gave no other signal; that he was on the lookout for signals, and none were given; that no one was standing on the track, but when he reached the station he saw a man on the south side of the track. The evidence for defendant was to the effect that it was dark when the train reached Glen's station.

The first and third instructions given for plaintiff are as follows: "(1) The court instructs the jury for the plaintiff, Lanning, that if they believe from the evidence in this case that defendant's passenger train No. 35 was scheduled to stop at the station of Glen when signaled to stop by those desiring to take passage thereon, and that Lanning, so intending, signaled said train, or that said train was signaled by Fields; and if they further believe from the evidence that the servants of said company in charge of said train could have, or by the exercise of ordinary care and diligence they should have, seen Lanning's signals, the defendant is guilty of negligence and carelessness in not seeing said signals and stopping said train for him to take passage thereon, and they should find for Lanning, and assess his damages in such sum as he by the evidence may show himself entitled." "(3) The jury are the sole judges of the damages, and, should they find for the plaintiff, in assessing compensatory damages they may take into consideration the physical pain, fatigue, and inconvenience to plaintiff because of the wrong done him; and should they believe that the acts of defendant's servants were characterized by willfulness or capriciousness, they may go beyond compensatory damages and assess punitive damages."

Southern Ry. Co. v. Lanning

W. J. Lamb, for appellant.

Johnson & Sharp, for appellee.

TRULY, J. The second instruction given for appellee is erroneous. It tells the jury that if they believe "that the engineer, or other employees, saw Lanning's signal, and their failure to stop the train was either willful or capricious on their part," then they were authorized to impose punitive damages. There was no proof to sustain the proposition that any "other employees" saw the signal, and the testimony leaves it uncertain as to whether or not the engineer saw it. Another defect in the instruction is that it should have stated that if the engineer "saw and understood the signal to stop," as was stated in *R. R. Co. v. White (Miss.)* 33 South. 970.

The third instruction for the appellee is too broad in its terms. It states to the jury that, should they believe "that the acts of defendant's servants were characterized by willfulness or capriciousness," they might assess punitive damages. The jury by this instruction were given no definite idea as to what "acts" were referred to, what "servants" were meant, or to what special matter their intention was intended to be directed.

There is no contention or suggestion that any signal was given on the occasion mentioned, other than the one testified to as having been made by the witness Fields. Therefore the first instruction for appellee was erroneous, and calculated to confuse, in submitting to the jury the question of whether Lanning "signaled said train." Under the facts of this case we might not reverse for this alone, but, as a new trial must be awarded for reasons hereinbefore indicated, this error should also be avoided on another trial.

The true rule as to the measure of damages in cases where passenger trains, being properly signaled by prospective passengers, fail to stop at flag stations, is this: If the engineer and fireman in charge of the locomotive, through no fault of their own, and while in the exercise of due care on their part, fail to see or obey the signal on account of the manner in which it is given, or by reason of prevailing atmospheric conditions, as fog or darkness, the railroad company is, for failure to stop the train, not liable; but if such employees fail to see the signal through negligence on their part, or when by exercise of ordinary care they could have seen it, the party damaged is entitled to recover compensatory damages; and if the signal is seen and understood by said employees, and their action in not stopping the train is malicious, wanton, or capricious, then the question of the infliction of punitive damages may properly be submitted to the jury. This is the principle deducible from the opinion in the *Wilson Case*, 63 Miss. 352, and the *White Case*, *supra*, and this rule should serve for the guidance of the court in granting instructions upon another trial of this cause.

Reversed and remanded.

AUGUSTA BROKERAGE CO. *v.* CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia, Oct. 15, 1904.)

[48 S. E. Rep. 714.]

Carriage of Freight—Discrimination—Powers of Railroad Commission.*

The Railroad Commission of this state, under the authority to make "such just and reasonable rules and regulations as may be necessary for preventing unjust discriminations in the transportation of freight," has power to promulgate a rule requiring railroad companies, in the conduct of their intrastate business, to "afford to all persons equal facilities in the transportation and delivery of freight, without unjust discrimination against any."

Same—Same—Willful Violation of Law—Exemplary Damages.

In a suit for damages sustained on account of a violation of the rule above referred to, exemplary damages may be recovered, if it appears that the conduct of the company amounted to a "willful violation of law"; and therefore allegations of the petition, which, if proved, would throw light on the question as to whether the conduct of the company was willful, should not be stricken as irrelevant and impertinent.

Sufficiency of Petition.

The special demurrers were not well taken, and, the petition setting forth a cause of action, it was error to sustain a motion to dismiss.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by the Augusta Brokerage Company against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

This was an action by the Augusta Brokerage Company, a firm engaged in the general brokerage business in the city of Augusta, including the buying and selling of cotton seed, against the Central of Georgia Railway Company. The allegations of the petition were, in substance, as follows: Prior to the wrong herein complained of the Railroad Commission of Georgia promulgated the following reasonable rule, the same being a part of rule 36: "The several railroad companies in this state, in the conduct of their intrastate business, shall afford to all persons equal facilities in the transportation and delivery of freight, without unjust discrimination against any." In December, 1903, plaintiff shipped to Augusta from a station on the line of defendant's road a car of cotton seed, and when the car arrived in Augusta a member of plaintiff's firm presented to the proper officer of the defendant the bill of lading, and requested that the car be delivered on the side track at plaintiff's warehouse. This request was refused. It is now, and has been for years,

*For authorities in this series on the subject of the powers of railroad commissions, see foot-note appended to Nashville, C. & St. L. Ry. Co. *v.* State (Ala.), 9 R. R. R. 186, 32 Am. & Eng. R. Cas., N. S., 186.

Augusta Brokerage Co. v. Central of Georgia Ry. Co

the common practice of defendant and other railroads at Augusta to make delivery of car load lots of freight at any point in the city on their own tracks, or on any line of tracks connecting with their own. No refusal to so deliver has been made by defendant to any of its customers, except plaintiff; and defendant has never refused to make such delivery to plaintiff of any other commodity in car load lots, except cotton seed, but almost daily makes delivery at plaintiff's warehouse of car load lots of hay, grain, etc. It is also the common practice of defendant to make delivery of cotton seed to the warehouses of all the cotton seed oil mills at Augusta having tracks connecting with tracks of defendant. The refusal of defendant to make delivery of the car load of cotton seed above referred to at plaintiff's warehouse was a denial to plaintiff of "equal facilities in the transportation and delivery of freight," and was an "unjust discrimination" against plaintiff, in violation of rule 36. In consequence of defendant's failure to deliver the car load of cotton seed, plaintiff was put to an expense of \$5, and claims this sum as actual damages. On numerous occasions during the current cotton seed season of 1903 defendant has refused to allow cars loaded with cotton seed belonging to plaintiff to be delivered to connecting roads at Augusta for reshipment in bulk, although such reshipment of cars was freely allowed to others, and such reshipping facilities were afforded to plaintiff in the case of cars loaded with lumber, etc., or any other article of merchandise except cotton seed. This refusal was likewise a violation of rule 36 of the Railroad Commission. In consequence of such refusal plaintiff has incurred an expense of \$54, which it claims as actual damages.

In addition to the foregoing averments, it was also alleged that the refusal of defendant to afford equal facilities with others was a part of a predetermined plan to drive plaintiff out of the business of buying cotton seed in sections of the country tributary to Augusta at points on the line of defendant's road; that defendant's commercial agent notified plaintiff in writing in the early part of 1903 that he would see to it that plaintiff did not do any cotton seed business on defendant's road; that when requested for cars in November, 1903, defendant's agent gave as an excuse a scarcity of cars, but, when plaintiff secured cars from another road and offered them to him, he admitted that he was fighting to prevent plaintiff from buying cotton seed on defendant's road; that defendant's agent told a member of plaintiff's firm that he intended to break up plaintiff's cotton seed business, because certain oil mills in the vicinity had agreed to ship over defendant's line a ton of cotton seed products for every ton of cotton seed brought to them over defendant's road; that as a further illustration of defendant's purpose it refused to issue to plaintiff through bills of lading from a station in Burke county to certain points, notwithstanding it was its

common practice to issue through bills of lading to such points for general merchandise; that defendant's action has resulted in giving a monopoly to the oil mills, as a result of which cotton seed is worth \$5.50 per ton less than on the same date last year, when plaintiff was in the market enjoying equal facilities. These acts of the defendant in denying plaintiff equal shipping facilities, and in making unjust discriminations against it, are characterized as willful violations of the law, and, it is alleged, render defendant liable for exemplary damages. Damages are claimed in the sum of \$10,000.

At the appearance term the defendant filed a special demurrer to those portions of the petition last referred to, upon the ground that they were irrelevant, immaterial, and impertinent, and also upon the ground that if there was a refusal to issue through bills of lading, as alleged, such refusal occurred in Burke county, and the city court of Richmond county had no jurisdiction. At the trial the defendant moved to dismiss the case upon the ground that the petition set forth no cause of action. The motion to dismiss and the special demurrer were sustained. Plaintiff excepted.

Wm. H. Fleming, for plaintiff in error.

Lawton & Cunningham, J. C. C. Black, and H. W. Johnson, for defendant in error.

COBB, J. (after stating the foregoing facts). If the Railroad Commission had authority to adopt that portion of rule 36 set forth above, the petition set out a cause of action. The law declares that the railroad commissioners "shall make reasonable and just rules and regulations, to be observed by all railroad companies doing business in this state, as to charges at any and all points for the necessary handling and delivery of freights; shall make such just and reasonable rules and regulations as may be necessary for preventing unjust discriminations in the transportation of freight and passengers on the railroad in this state; * * * and shall make just and reasonable rules and regulations, to be observed by said railroad companies on said railroads, to prevent the giving or paying of any rebate or bonus, directly or indirectly, and from misleading or deceiving the public in any manner as to the real rates charged for freight and passengers." Civ. Code 1895, § 2189. The rule of the commission provides that railroad companies, in the conduct of their intrastate business, shall afford to all persons "equal facilities in the transportation and delivery of freight, without unjust discrimination against any." The commission is authorized by the very terms of the act to make any reasonable rules that may be necessary to prevent unjust discriminations in the transportation of freight, and to allow to one shipper privileges which are not allowed to another whose situation is substantially the same is unquestionably an unjust discrimination.

It is said, though, that, even conceding this to be true, the Railroad Commission is authorized simply to make rules in reference to the transportation of freight; that transportation ends when the goods arrive at the terminal station of the railway company at the point of destination; that a regulation dealing with the conduct of the carrier after the goods have reached such station is not a regulation of transportation, but a regulation of the use of terminal facilities; and that therefore the rule which deals with discriminations as to facilities should not be construed to refer to facilities which are brought into operation after the transportation service has been completed. The case of *Dixon v. Central of Georgia Railway Company*, 110 Ga. 173, 35 S. E. 369, is cited to establish the proposition that there is a distinction between a transportation service and switching or transfer service, and that the service which was withheld from the plaintiff in the present case was a switching or transfer service, and not a transportation service. There is nothing in that case which holds that where a railroad company, either as a result of a contract or a custom, delivers from its terminal station loaded cars on a side track at the place of business of a consignee, it is not, when so engaged, performing duties incident to transportation of freight; but it was simply held that, construing what was then rule 25 in reference to the rate to be charged for switching or transferring cars from a point on one road to a connecting road or warehouse within the space of three miles, in connection with the rules regulating rates of freight ordinarily to be charged, the ordinary rates of freight were allowable until the car reached the terminal station at destination, and that rule 25 was operative from such station to the point where such car was delivered to the connecting road, place of business, or warehouse. The court was not dealing with the word "transportation" as found in the act, and the expression "transportation service" was used for convenience, simply to distinguish the service performed before the terminal station was reached and the service performed between the terminal station and the connecting road or warehouse. If a railway company carries freight beyond its terminal station, when this service is performed either voluntarily or as the result of a contract or custom, it is no less engaged in the transportation of freight than it was when the freight was being carried between the initial point of carriage and the terminal point of carriage; and the words "transporting" and "transportation," which occur in the rule under consideration in the *Dixon Case*, are there used in this very sense. See 30 Rep. R. R. Com. of Ga. p. 31.

It is contended that the power of the Railroad Commission in reference to unjust discriminations is confined to rates and charges, and the case of *State v. Wightsville & Tennille Railroad Company*, 104 Ga. 437, 30 S. E. 891, is cited to sus-

tain this contention. There is, however, no authoritative ruling in that case to the effect that the power of the Railroad Commission is so limited. It was there held that the refusal of the railroad company to issue a through bill of lading over the line of one of its connecting carriers, when it was in the habit of issuing such bills of lading over the line of another connecting carrier, was not a violation of rule 32 of the commission (see 30 Rep. R. R. Com. p. 32), which contained substantially the provisions of the act of 1874 (Acts 1874, pp. 94, 95), as contained in Civ. Code 1895, §§ 2212-2214. It was held that the Railroad Commission had no power, either under the act referred to or under the rule, to compel a railroad company to make a contract. There is nothing in that decision, when taken in the light of the question then under consideration, which can be construed into a ruling that the word "transportation," as used in the clause of the act now under consideration, included only service rendered between the initial point of carriage and the terminal station of the railway company at the point of destination.

Having reached the conclusion that the authority of the Railroad Commission to make rules and regulations for preventing unjust discriminations in the transportation of freight authorized the promulgation of rule 36, it is unnecessary to determine whether the withholding of service of the character withheld from the plaintiff in the present case, when such service was rendered to other customers similarly situated, was such an indirect giving of a bonus to the other customers as to be an unjust discrimination in rates and charges. The commission had authority to make the rule, the conduct of the railroad company was in violation of the rule, and it was therefore error to sustain the motion to dismiss the petition.

It was also erroneous to sustain the special demurrer, for the reason that those portions of the petition which were attacked by the special demurrer were not allegations in relation to the cause of action, but were simply averments of matters of aggravation, which might be proven and considered, by the jury in determining whether the conduct of the railroad company had been so willful as to authorize the assessment of exemplary damages under the provisions of Civ. Code 1895, § 2197.

During the argument attention was called to the fact that in 31 Rep. R. R. Com. of Ga. the rules appear to have been amended and rearranged, and what was originally rule 36 has become rule 2, and that the language of the rule had been changed. See page 20. It does not appear from the published report when these changes were made, but an examination of the minutes of the Railroad Commission shows that the change in rule 2 did not take effect until May 1, 1904, and therefore rule 36 was in force at the time of the trans-

Bosworth v. Union R. Co

actions complained of in the petition. It would seem, upon principle, that we should take judicial notice of what appears upon the minutes of the Railroad Commission as to the promulgation of its rules and regulations; but we now make no authoritative ruling on this question. If we can take judicial notice of what appears on such minutes, it appears therefrom that rule 36 was in force at the time of the injury complained of. If we cannot take such judicial notice, we must look to the petition, and the petition avers that rule 36 was in force at the time in question.

Judgment reversed. All the Justices concurring.

BOSWORTH v. UNION R. CO.

(Supreme Court of Rhode Island, July 28, 1904.)

[58 Atl. Rep. 982.]

Passenger Injured by Strike Sympathizer—Notice to Carrier of Danger—Sufficiency of Evidence.*

Plaintiff was a passenger on a street car running between two towns, and was injured by being struck by a stone thrown from one of a mob of strike sympathizers. A strike had been on for some days, accompanied with violence; but the mob had been suppressed in one of the towns, and cars were running regularly at the time. There was no indication of danger either to plaintiff or the motorman as the car passed until the stones were thrown, except the presence of a large number of people on the street. Policemen were present, and, though the preceding car had been stoned, such car was not in sight of the motorman of the car on which plaintiff rode at the time, and the stoning thereof was unknown to him: *held*, that the evidence was insufficient to show notice to defendant that it was dangerous to run cars there by reason of the mob, and hence defendant was not liable.

Same—Judicial Notice.

In an action for injuries to a passenger on a street car by stones thrown by strike sympathizers, the court would take judicial notice of the historical fact that on a certain date, which was the date of the injury, the governor had ordered a military force to the town in question to preserve order and restrain violence toward the property and employees of the street railway company, and had issued a proclamation calling upon all persons riotously assembled to disperse.

Same—Notice to Carrier of Danger—Governor's Proclamation.

Where a passenger on a street car was injured by stones thrown by strike sympathizers, the fact that on the morning of the day the injury occurred the governor had ordered out the militia to restrain violence toward the property and employees of the street railway company, and had issued a proclamation calling upon all persons riotously assembled to disperse, was not notice to the street car company that it was dangerous to run its cars, but was rather an invitation to operate its road under the protection of the militia.

Tillinghast, J., dissenting.

*As to the carrier's duties with respect to the protection of its passengers against strangers, see foot-note appended to *Dufur v. Boston & M. R. Co.* (Vt.), 9 R. R. R. 711, 32 Am. & Eng. R. Cas., N. S., 711; *Penny v. Atlantic Coast Line R. Co.* (N. Car.), 10 R. R. R. 606, 33 Am. & Eng. R. Cas., N. S., 606.

Bosworth v. Union R. Co

Action by Benjamin B. Bosworth against the Union Railroad Company. A verdict was directed in favor of defendant, and plaintiff applies for a new trial. Denied.

See 55 Atl. 490.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

John W. Hogan and Henry E. Tiepke, for plaintiff.

Henry W. Hayes, Frank T. Easton, and Lefferts S. Hoffman, for defendant.

DOUGLAS, J. This is an action to recover for injuries alleged to have been caused by the negligence of the defendant. From the testimony of the plaintiff and his witnesses it appears that the plaintiff, an elderly man, on the morning of June 12, 1902, was a passenger on one of the defendant's open cars running from Providence to Pawtucket. A strike against the company had been on for some days, accompanied with violence; but the mob had been suppressed in Providence, and cars were running regularly. The car ran as usual, stopping from time to time to take on and let off passengers, until it reached a point in Pawtucket on Pawtucket avenue at the junction with East avenue, when suddenly it was assailed with a shower of stones thrown from the side of the way. The plaintiff was probably struck by a stone, and rose from his seat in fright and extended his hand, as he says, to notify the conductor or to ring the bell. He was seen to walk to the side of the car and to fall to the ground. His own memory of what he did is uncertain, and the witnesses are unable to say whether he attempted to step off or not. When he fell his leg was broken, and he was considerably bruised and hurt in other parts of his body. There was no indication of danger visible to him or to any one on the car until the stones were thrown, except the presence of a large number of people on the street. The witnesses vary in stating the number of people there. The two policemen and another witness estimate that there were 800 or 1,000, and a citizen witness says there must have been 150. No one states that there was any uproar or threatening behavior in sight of the car on which the plaintiff was until it reached the crowd. The stones were thrown by those in the rear, next to the houses. One witness testifies that the next preceding car, some 15 minutes before, had been stoned a little farther down the street towards the center of the city of Pawtucket, but this car had passed out of sight before the following one appeared. The rest of the testimony relates to the physical condition of the plaintiff and the extent of his injuries.

After this testimony was in, the defendant moved that the presiding justice direct a verdict in its favor, and he granted the motion, saying: "The defendant would not be liable for

Bosworth v. Union R. Co

an injury received by passengers through the throwing of stones by people outside, unless the car was propelled into a place of known danger, and the proof in this case on that point is simply that another car had been stoned. It does not appear to the court that there is sufficient notice to the defendant or sufficient evidence that the dangerous state of things had prevailed for a length of time sufficient so that the defendant could be presumed to have notice. I therefore direct the jury to return a verdict for the defendant." To this decision the plaintiff excepted, and now prays for a new trial on the ground that it was erroneous. He argues, first, that notice to the conductor in charge of the car was notice to the company. The suit, he says, does not charge the company with negligence in dispatching the car to Pawtucket, but in proceeding when the mob was seen in the street. We understand that this is exactly the view which the presiding justice took. He decided, in effect, that there was nothing in the presence and behavior of the crowd to notify the motorman or conductor that there was danger in proceeding, and, therefore, the company is not liable.

We are unable to see how the court could have taken any other view of the situation. The motorman saw ahead of him a number of men walking, as one witness says, slowly along the street, making, as all agree, no hostile demonstration. Among them were two policemen, charged by law with the duty of suppressing disturbances. The motorman could not have known that a car had been stoned by these people 15 minutes before. No warning came from the policemen or others that the crowd had hostile intentions, and the motorman's duty was clearly to carry his passengers along his route as far as they wished to go, until, at least, some threat or show of obstruction should be made. When the stones were thrown the car was in the midst of the crowd, and there was no course open to him but to proceed. We cannot see that in any respect he or the company, as represented by him, was guilty of any negligence towards the plaintiff. If, on sight of the crowd a quarter of a mile away, the car had stopped and refused to carry the plaintiff farther, he might well have complained of breach of duty. Having the same knowledge which the motorman possessed, the plaintiff could have left the car before approaching the crowd if he had chosen to do so. The risk, if any there was, was as obvious to him as to the defendant's servants.

The defendant has referred us to a case decided by the Supreme Court of Minnesota, January 23, 1903, *Fewings v. Mendenhall, Receiver*, 93 N. W. 127, 60 L. R. A. 601, 97 Am. St. Rep. 519, which is similar to the case at bar in all its important features. In that case a passenger in one of the defendant's cars was struck by a stone thrown by a strike sympathizer, and injured. The court held that, though a strike against the road was in operation, it was no negligence

for the receiver to run the cars, nor to omit to cover the windows of them with canvas or to draw down the leathern curtains, nor to fail to notify the plaintiff of the existence of a strike which he and all intelligent citizens were aware of. The cases defining the degree of care imposed by law upon a carrier of passengers are carefully reviewed, and the conclusion is reached that, while common carriers are insurers of freight against all damage except the act of God and the public enemy, and are bound to exercise for the safety of passengers the highest degree of care and foresight consistent with the orderly conduct of their business with respect to all matters under their control, the same strict rule does not apply to acts of persons beyond their control. The court say (page 129): "A number of other cases are cited and relied upon by counsel, wherein the general rule is stated substantially as contended for by him, namely, that a carrier of passengers is required to exercise the utmost vigilance to protect passengers from insult and injury from whatever cause arising; but an examination of them shows that they are all cases where the carrier had permitted third persons to enter upon its premises or cars, and thereafter failed to exercise a proper degree of care to restrain them from acts of lawlessness; and there can be no question as to their soundness. The question before us is whether this strict rule applies to the act of a stranger, such as here shown. That it does not is sustained by some very respectable authorities. *Tall v. Packet Co.* (Md.), 44 Atl. 1007, 47 L. R. A. 120; *Railroad Co. v. MacKinney*, 124 Pa. 462, 17 Atl. 14, 2 L. R. A. 820, 10 Am. St. Rep. 601; *Thomas v. Railroad Co.*, 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416; *Railroad Co. v. Pillsbury*, 123 Ill. 21, 14 N. E. 22, 5 Am. St. Rep. 483. In our opinion, it would be unjust to require a carrier of passengers, either a steam or a street railway company, to exercise the utmost care and vigilance to guard and protect passengers from criminal acts of strangers, persons not under its control or subject to its orders, and for whose acts it is in no way responsible. And we hold, without further discussion, as respects the acts of such strangers, that carriers of passengers are liable to the exercise of ordinary care and prudence only. Such carrier is liable for all injuries resulting from the acts of strangers which are reasonably to be anticipated under the particular circumstances, and which ordinary care and prudence, had it been exercised, would have prevented." These observations are supported by the cases cited, and seem to us just and reasonable. It is the duty of the civil authorities, not of a railroad company, to preserve order in the streets.

The opinion of the court upon demurrer to this declaration (25 R. I. 202, 55 Atl. 490) stated the general rule which requires of a railroad company the utmost care and skill in the operation of their road and the safe transportation of their

passengers, but the court did not have before them the circumstances of the case as they were since developed by the evidence. The declaration alleged that the car was run into the midst of a mob who were threatening to do violence and to inflict injury upon the company's property, which the company well knew. The demurrer to these allegations was rightly overruled. While the rule as stated is of very general application, it must be limited, at least to known dangers, when they are occasioned entirely by causes beyond the control of the carrier.

The plaintiff's counsel calls to our notice the historical events connected with this strike, and particularly that very early in the morning of the day when this injury was inflicted the governor had ordered a military force to Pawtucket to preserve order and restrain violence towards the property and employees of the street railroad company, and had issued his proclamation calling upon persons riotously assembled at Pawtucket to disperse. These circumstances are such as the court takes judicial notice of when brought to its attention (1 Greenl. Ev. § 6; Steph. Ev. p. 121, note 9), but there is nothing in the record or the decision to show that they were ignored in the consideration of the case by the trial court. Briefly considered, the circumstances amount to this—that the municipal authorities of Pawtucket had tolerated violence and crime, and the chief executive of the state had interposed to repress them. It was very easy to anticipate that violence would cease when the power of the law was displayed on the side of peace; and so, after the militia had taken up the work which the police had neglected, the company might confidently resume its service with no fear of danger. These considerations would address themselves more properly to the controlling officers of the company who dispatched the cars upon their several routes, but if the motorman and conductor of this car knew of the situation they might rely in all good faith upon the security which the militia was sent to effect. The fact that the evildoers had been warned and the militia had assumed the duty of keeping the peace were invitations to the defendant to run its cars, not notifications of danger.

Taking all the circumstances into consideration, it is plain that the defendant was not guilty of any neglect of duty towards the plaintiff, and the verdict was properly directed.

Petition for new trial denied, and case remitted to the common pleas division for judgment.

MURPHY v. NORTH JERSEY ST. RY. CO.

(Supreme Court of New Jersey, July 6, 1904.)

[58 Atl. Rep. 1018.]

Injury to Passenger—Boarding Moving Car—Contributory Negligence and Assumption of Risk.*

Although it cannot be held, as a matter of law, that a person who attempts to board a trolley car while it is in motion is negligent, yet, when the fact that the car is in motion is the sole producing cause of the injury sued for, the risk of its occurrence is one which the person making the attempt must be held to have assumed.

Pleading and Proof.

A plaintiff is only entitled to recover by establishing the truth of his case as laid in his declaration, and, if he fails to do this, the defendant is entitled to the verdict of the jury.

(Syllabus by the Court.)

Error to Circuit Court, Essex County.

Action by Patrick Murphy against the North Jersey Street Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Argued November term, 1904, before GUMMERE, C. J., and DIXON, GARRISON, and SWAYZE, JJ.

Leonard Kalisch, for plaintiff.

C. H. Beasley, for defendant.

GUMMERE, C. J. This action is brought to recover compensation for injuries received by the plaintiff while attempting to board a car of the defendant company at the Market Street Station in the city of Newark. The allegation of the declaration is that while the defendant's car was standing at the station the plaintiff attempted to get upon it, and that while he was in the act of boarding it the employees of the defendant company negligently and improperly started the car, thereby throwing the plaintiff to the ground. The plea was the general issue. The proof submitted by the plaintiff at the trial corresponded with the allegations of the declaration. The case made by the defendant was that its car had already started when the plaintiff approached it for the purpose of becoming a passenger on it; that while it was in motion he attempted to board it, missed his hold upon the grip, and fell to the ground, thereby receiving the injuries for which he sues. In his charge to the jury the trial judge, in commenting upon the case made by the defendant, instructed them that, even if they believed the accident to have occurred in the way testified to by the defendant's witnesses, they would nevertheless have a right to find a verdict for the plaintiff, if they concluded that the defendant was guilty of negligence. This instruction was erroneous. In the first

*As to whether it is contributory negligence to board a moving street car, see foot-note appended to *Southern Ry. Co. in Miss. v. Williams* (Miss.), 12 R. R. R. 90, 35 Am. & Eng. R. Cas., N. S., 90.

place, there was nothing in the operation of the car, if the testimony submitted on the part of the defendant was true, upon which the conclusion that it was negligent could be rested. If the car was in motion when the plaintiff first evinced by his action an intention to take passage upon it, the mere fact that it continued to move while the plaintiff was making his attempt is not, of itself, any evidence of the defendant's negligence. Moreover, although it cannot be said, as a matter of law, that a person who attempts to board a trolley car while it is in motion is negligent, yet when the fact that the car is in motion is the sole producing cause of the injury the risk of its occurrence is one which the person making the attempt must be held to have assumed. In the second place, it is a cardinal rule for the control of a trial court that only those questions which are within the issues raised by the pleadings should be submitted to the jury, and a failure to observe this rule is legal error. *Excelsior Electric Co. v. Sweet*, 59 N. J. Law, 441, 31 Atl. 721. The issue presented by the pleadings for the determination of the jury in the present case was whether the defendant had caused the plaintiff's injury by negligently starting the car while he was in the act of getting upon it. This was the claim which was set up by the plaintiff in his declaration and denied by the defendant in its plea, and which the plaintiff was bound to establish by proof in order to entitle him to a verdict. If, at the trial, he had abandoned this position, and had attempted to show that his injury was due to an entirely different cause—for instance, the defective condition of the step upon the car—he, of course, would not have been permitted to do so, for it is elementary law that a plaintiff cannot recover for a cause of action other than that set out in his declaration. And this principle is equally applicable when dealing with the case made by the defendant in contradicting the plaintiff's claim. The defendant is only required to prove that he was not guilty of the negligent act charged against him in the declaration. When he does this by showing that the accident which produced the plaintiff's injury was due to a cause entirely different from that alleged by the latter, he has relieved himself from responsibility, so far as the action then being tried is concerned. To compel him to go further, and disprove responsibility for the existence of that case, is to require him to meet an issue which the case does not present.

The judgment under review should be reversed.

AUGUSTA RY. & ELECTRIC CO. *v.* SMITH.

(Supreme Court of Georgia, Oct. 15, 1904.)

[48 S. E. Rep. 681.]

Passengers—Regulations—Riding in Dangerous Place—Degree of Care.

A railway company has the right to make reasonable rules and regulations prohibiting passengers from occupying positions on its cars considered to be dangerous, except at their own risk; but when, notwithstanding such rules, passengers are permitted, and in some instances required, to occupy such positions, the company is still under the duty to exercise extraordinary care and diligence for their safety.

Negligence—Instructions.

On the trial of a suit for damages alleged to have been occasioned by the negligence of the defendant, it is always error, requiring the grant of a new trial, for the court to charge the jury that given acts constitute negligence, when such acts are not declared by statute to be negligent.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by N. G. Smith against the Augusta Railway & Electric Company. Judgment for plaintiff. Defendant brings error. Reversed.

Boykin Wright, for plaintiff in error.

E. H. Callaway, for defendant in error.

CANDLER, J. The plaintiff's husband, for whose homicide the present suit was brought, was a passenger on a car of the defendant street railway company, occupying a standing position on the rear platform. The following printed notice was posted on the car: "It is dangerous to ride upon this platform or steps; to get on or off cars while in motion; to get on or off cars next to adjoining tracks. Passengers violate these warnings at their own risk." It was in evidence on the trial, however, that no smoking was allowed inside the car, passengers who desired to smoke being required to ride on the platform, and that the deceased was smoking at the time of the occurrence under investigation. At the point where the deceased wished to get off the car, the track of the street car company was intersected by tracks of a steam railroad. As the car approached this point the deceased got down on the step of the platform, with the evident intention of alighting therefrom, but before he could do so a locomotive of the steam railroad company collided with the street car, and he was thrown under the wheels of the engine and killed. His widow sued the street car company, alleging in her petition that at the time of the homicide the approaching engine and train were preceded by a flagman with a lighted lantern, and that ample warning was given to all in the vicinity of the crossing, but that the motorman in charge of the street car disregarded this warning, and negligently and recklessly ran his car upon the railroad tracks in

front of the moving train. The jury found for the plaintiff; the defendant moved for a new trial, which was denied, and it excepted.

1. It is contended that the court erred, in charging with reference to the rule or warning, already mentioned, in regard to the danger in riding upon the platform of the car, in giving the following instructions: "If the rule was violated, the law says that if one who voluntarily leaves a safe place, or a place assigned to him, to occupy a place of greater danger and more peril, he assumes the additional risk. But if it is assumed with the knowledge and consent of the defendant, then the law requires that defendant should continue to exercise extraordinary care and diligence that would be necessary for one who occupies such a position with its knowledge." We see no error in this charge. It was, of course, permissible for the defendant to make reasonable rules and regulations requiring its passengers to occupy positions of safety while on its cars, and, had the deceased insisted upon standing on the platform over the protest of the conductor and in spite of the warning conveyed in the printed notice, and had it appeared that his death resulted from his disregard of the rules of the company, an altogether different case would have been presented for our consideration. As before stated, however, there was evidence from which the jury were authorized to find that the deceased was smoking, and no evidence that he was not. Smoking was not prohibited on the cars of the defendant, and those who smoked were not only allowed, but were required, to stand on the platform. Regardless of this circumstance, it was undisputed that he had ridden for quite a distance on the platform, and that the conductor knew of his presence there and made no effort to have him go inside the car. Certainly, then, the defendant cannot escape liability on the ground that he occupied a position which it permitted, if it did not require, him to occupy. His position on the platform under the circumstances did not render him any less a passenger of the defendant, or relieve the company of the duty placed upon it by law to observe extraordinary diligence to secure his safety. See, on this subject, *Ball v. Mabry*, 91 Ga. 782, 18 S. E. 64; *Central R. Co. v. Lippman*, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673 (3). What is here ruled applies to several of the grounds of the motion which make substantially the same assignments of error.

2. The court charged the jury as follows: "Ordinarily a street railway company is bound to run its cars with such caution only as will insure the safety of those occupying positions provided for passengers, and pointed out to them as safe; and if a passenger voluntarily occupies a position of increased risks and is injured, to render the company liable for such injury, circumstances must be shown from which may be implied an undertaking on the part of the company,

despite the increased risk, still to carry such passenger with safety. * * * But if you find that the place of danger was occupied with the knowledge and consent of the agents of the defendant, then the defendant would be liable. It would be concurrent negligence on the part of the common carrier to permit one to occupy an obviously dangerous place." It appears from the record that at this point counsel for the plaintiff interrupted the court with the following suggestion: "Your honor stated, in commenting on that, that the company would be liable. You mean that it would be bound to exercise ordinary care and diligence;" and the court continued its charge as follows: "It would still be bound to exercise that ordinary care and diligence that would be necessary, knowing that the party was in this dangerous position by his consent and with his knowledge." It is well settled by the decisions of this court that on the trial of an action for damages it is error, requiring the grant of a new trial, for the court to charge the jury that any given state of facts will constitute negligence, unless such facts are by statute declared to constitute negligence. It is necessary to call attention to only a few of the more recent cases that have announced this doctrine. As was said in *Central R. Co. v. McKenney*, 116 Ga. 16, 42 S. E. 231, "the question is not an open one in this state;" and in the case cited, Mr. Justice Little, delivering the opinion, quoted from the opinion in the case of *Atlanta, Knoxville & Northern R. Co. v. Bryant*, 110 Ga. 247, 34 S. E. 350, as follows: "It is error for the judge, on the trial of an action to recover damages against a railroad company for personal injuries occasioned by the running and operation of its trains, to charge the jury that acts not falling within the class below indicated constitute negligence. Only the commission of those acts which are prohibited by statute, or the omission of those things which are prescribed by statute, constitute, under such circumstances, negligence per se. Whether the commission of acts other than those so inhibited, or the omission to perform those required, constitute negligence, is a question of fact, and must be determined by the jury, and not by the judge." To the same effect see *Mayor v. Wood*, 114 Ga. 370, 40 S. E. 239; *Portner Brewing Co. v. Cooper*, 116 Ga. 171, 42 S. E. 408 (3); *Alabama Midland R. Co. v. Guilford*, 119 Ga. 523, 46 S. E. 655 (4); and the numerous cases cited in *Atlanta, Knoxville & Northern R. Co. v. Bryant*, supra. It is urged, however, that, after the suggestion offered by counsel for the plaintiff below, the judge cured whatever error there may have been in the charge complained of by reason of the portion of the charge immediately following. We cannot agree with this view. The subsequent remarks of the trial judge cannot, we think, be fairly said to contain an intimation that the previous charge was incorrect, or to have a tendency to convey to the minds of the jury the impression

Chicago Union Traction Co. v. Hanthorn

that there was any intention to modify the language already used. Indeed, the language which it is contended cured the error in the preceding charge is entirely consistent with that charge, and we do not think it can be successfully urged that a jury of average intelligence would be bound to understand, or would be likely to understand, from what was last said, that the judge intended to retract or qualify what was said in the first instance; and we are of the opinion that the charge referred to, under the authority of the cases cited, compels the grant of a new trial.

The motion for a new trial is voluminous, and contains many grounds, but only those which have been dealt with in the foregoing require discussion here. Several grounds of the motion complain of alleged error in the admission of evidence, and, while some of the evidence objected to appears to have been irrelevant, it is hardly conceivable that it could have injuriously affected the rights of the defendant. Some of the requests to charge were objectionable as not stating correct principles of law, some asked the court to commit error of like character to that dealt with, from which a new trial results, while others, which were applicable to the case at bar, were fairly covered by the charge as given.

Except as pointed out in the second division of this opinion, we find no error in any of the charges of which complaint is made; but on account of that charge the judgment is reversed. All the Justices concur, except LAMAR, J., disqualified.

CHICAGO UNION TRACTION CO. v. HANTHORN.

(Supreme Court of Illinois, Oct. 24, 1904.)

[71 N. E. Rep. 1022.]

Instructions.

It is improper for the trial court to limit the number of tendered instructions.

Same—Harmless Error.

Marking a tendered instruction "not received," instead of "refused," is not material where the instruction should not have been given.

Same—Issues.

In an action against a street car company for injury to a passenger, where the action was based on negligence in suddenly starting the car as plaintiff was about to alight, it is proper to refuse a tendered instruction relating to negligence in failing to properly stop the car.

Injury to Street Car Passenger—Contributory Negligence—Failure to Take Hold of Railing When Alighting.*

As it is not, as a matter of law, contributory negligence for a street car passenger to fail to take hold of the rail or bar of the car while rid-

*For authorities in this series on the subject of the contributory negligence of passengers in alighting from cars, see foot-note appended to *Simmons v. Seaboard Air Line Ry.* (Ga.), 11 R. R. R. 454, 34 Am. & Eng. R. Cas., N. S., 454, and foot-note appended to *Paganini v. North Jersey St. Ry. Co.* (N. J.), 11 R. R. R. 14, 34 Am. & Eng. R. Cas., N. S., 14 (alighting from moving cars); foot-note appended to *Illinois Cent.*

Chicago Union Traction Co. v. Hanthorn

ing on the platform preparatory to alighting, it was proper to refuse an instruction, in an action for injury in being thrown off by the sudden starting of the car, that such failure of a passenger would be contributory negligence.

Same—Same—Instructions.

In an action by a passenger on a street car for injuries received, where the instructions required the jury to find that plaintiff could not recover unless she was in the exercise of due care for her own safety, and that the giving of notice in some way to the conductor that she desired to alight was involved in her exercise of due care, it sufficiently presented to the mind of the jury the question of notice to the conductor.

Instructions.

An instruction requiring the jury to notice and consider the extent to which any one of the instructions given might be qualified by other instructions is not erroneous, as submitting to the jury a question of law. **Same.**

Instructions to the jury must be regarded as a continued series, and it must be clear that the jury have drawn an improper inference from a single instruction before the judgment will be reversed.

Appeal from Appellate Court, First District.

Action by Ida M. Hanthorn against the Chicago Union Traction Company. The judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. **Affirmed.**

This is an action of trespass on the case, brought on August 21, 1900, by the appellee against the appellant company in the superior court of Cook county to recover damages for a personal injury. The jury returned a verdict in favor of plaintiff for \$2,500, of which amount \$1,000 was remitted, and judgment was entered in favor of the appellee and against the appellant for the sum of \$1,500 and costs.

R. Co. v. Jolly (Ky.), 11 R. R. R. 27, 34 Am. & Eng. R. Cas., N. S., 27 (standing in moving car); Parker v. Washington Electric St. Ry. Co. (Pa.), 11 R. R. R. 610, 34 Am. & Eng. R. Cas., N. S., 610 (proper to decline, at defendant's instance, question of contributory negligence to the jury, where boy about seven years old went on front platform to tell motorman where he wanted to get off, and either fell or jumped off the platform, and was injured); Yazoo & M. V. R. Co. v. Humphrey (Miss.), 11 R. R. R. 1, 34 Am. & Eng. R. Cas., N. S., 1 (question for jury where passenger standing in car aisle was thrown down by violent jolt in switching); Gilmore v. Seattle & R. Ry. Co. (Wash.), 6 R. R. R. 143, 29 Am. & Eng. R. Cas., N. S., 143 (alighting passenger holding to hand railing); United Rys. & Electric Co. of Baltimore v. Woodbridge (Md.), 8 R. R. R. 156, 31 Am. & Eng. R. Cas., N. S., 156 (passenger was not guilty of, as matter of law, in attempting to alight after conductor called transfer point, and car stopped); Leveret v. Shreveport Belt Ry. Co. (La.), 9 R. R. R. 611, 32 Am. & Eng. R. Cas., N. S., 611 (alighting passengers may assume that officials have taken proper precautions to insure their safety); Missouri K. & T. Ry. Co. of Texas v. Hay (Tex.), 2 R. R. R. 122, 25 Am. & Eng. R. Cas., N. S., 122 (jumping from side door of car instead of leaving by steps); Newcomb v. New York Cent. & H. R. R. Co. (Mo.), 4 R. R. R. 883, 27 Am. & Eng. R. Cas., N. S., 883 (jumping on greasy platform); Chicago, etc., Ry. Co. v. Sattler (Neb.), 3 R. R. R. 688, 26 Am. & Eng. R. Cas., N. S., 688 (leaving car for some purpose not incident to journey); Bass v. Norfolk Ry. & Light Co. (Va.), 1 R. R. R. 194, 24 Am. & Eng. R. Cas., N. S., 194 (alighting from street car, passing around it, and stepped on other track without look-

Chicago Union Traction Co. v. Hanthorn

Upon appeal to the Appellate Court this judgment has been affirmed. The present appeal is prosecuted from such judgment of affirmance.

The declaration alleged that, on November 24, 1899, the appellant was operating a street railroad on North State street, in Chicago, and a passenger car propelled by electricity over the same; that said car was running in a northerly direction along State street at or near its intersection with Superior street; that appellee was a passenger on the car; that appellant reduced the speed of the car, but failed to bring the same to a stop; that while appellee, with all due care, was preparing to get off the car and was about to alight therefrom, appellant negligently started the car suddenly forward at an increased rate of speed; that appellee was thereby violently thrown upon the street, and was bruised and wounded, and one of her arms was broken, and she was permanently injured externally and internally, etc.

John A. Rose (W. W. Gurley, of counsel), for appellant.
J. D. Riley (Rufus Cope, of counsel), for appellee.

MAGRUDER, J. (after stating the facts). The first contention made by the appellant is that the trial court erred in declining to mark all the tendered instructions either "refused" or "given." At the beginning of the trial the court of its own motion entered an order limiting the number of instructions to be tendered to 30, or 15 for each side, to which order the appellant excepted. The order in question was improperly entered by the trial court. In *Chicago City Railway Co. v. Sandusky*, 198 Ill. 400, 64 N. E. 990, we held that the trial court has no power to arbitrarily limit the num-

ing); *Texas & P. Ry. Co. v. Gardner* (C. C. A.), 3 R. R. R. 759, 26 Am. & Eng. R. Cas., N. S., 759 (prima facie case of contributory negligence not established by evidence of misstep of passenger while alighting); *McDonald v. Boston & Maine R. Co.* (Me.), 2 Am. & Eng. R. Cas., N. S., 293 (advice of conductor as to method of leaving train); *Hinshaw v. Raleigh & A. A. L. R. Co.* (N. Car.), 3 Am. & Eng. R. Cas., N. S., 558 (alighting at some distance from station at invitation of conductor); *Brockett v. Fair Haven & W. R. Co.* (Conn.), 20 Am. & Eng. R. Cas., N. S., 406; *Flanagan v. Philadelphia, W. & B. R. Co.* (Pa.), 8 Am. & Eng. R. Cas., N. S., 119 (alighting from wrong side of train); *Chesapeake & O. Ry. Co. v. Friel* (Ky.), 8 Am. & Eng. R. Cas., N. S., 126 (passenger alighting from train is not guilty of negligence in assuming that his car is at the platform, when, owing to the snow covering the ground, there is nothing to show him the train has not stopped at the station); *Illinois Cent. R. Co. v. Davidson* (C. C. A.), 7 Am. & Eng. R. Cas., N. S., 715 (passenger instead of leaving train by safe exit, which was provided, alighted on the other side on a platform, which was so narrow that he was injured by a second train, which came upon the opposite side of the platform); *Coburn v. Philadelphia, W. & B. R. Co.* (Pa.), 20 Am. & Eng. R. Cas., N. S., 32 (carelessly stepping down from car not having sufficient steps is); *Bohannon v. Southern Ry. Co.* (Ky.), 23 Am. & Eng. R. Cas., N. S., 548 (alighting at other point than station); *Baltimore Traction Co. v. Helms* (Md.), 6 Am. & Eng. R. Cas., N. S., 651 (alighting from street car, and passing behind it without looking to see if other cars are approaching); *Vasele v. Grant St. Electric Ry. Co.* (Wash.), 9 Am. & Eng. R. Cas., N. S., 75.

ber of instructions to be given for each side. But we are unable to see that in this case the appellant suffered any injury upon the trial from the action of the court in this regard.

The appellee tendered only 5 instructions, all of which were given. The appellant tendered 18 instructions. Of these, one, numbered 6, was refused; two, numbered 7 and 9, were modified, and given as modified; one, numbered 17, was not marked "refused" or "given," but was marked "not received," and was not given or read to the jury. All the other instructions asked by the appellant were given as asked. The trial court should have marked the instruction numbered 17 "refused" or "given." But if the refusal of the court to read the instruction to the jury did the appellant no harm, the fact that the instruction was marked "not received," instead of "refused," would make no material difference. The question then arises whether instruction numbered 17 correctly announced the law to the jury or not. If it did not correctly state the law, then the action of the court in marking it "not received" cannot be regarded as error.

The material part of the instruction in question was the announcement to the jury that, before they could find the appellant guilty of the negligence charged in the declaration, they must believe from the preponderance of the evidence in the case that the servants of the appellant, or some of them, in charge of the car, had notice of the desire or intention of the appellee to get off or alight from said car at the time and place alleged, and a reasonable time and opportunity after such notice to stop the car; and the instruction then closes as follows: "And if the jury believe from the evidence in the case that the defendant's servants had no such notice and opportunity, that then the jury should not find the defendant guilty of negligence in failing to stop such car at or near the street crossing alleged." We concur in the view expressed by the Appellate Court, in their opinion deciding this case, that it is a sufficient answer to the objection made to the refusal to give this seventeenth instruction "that the declaration does not charge that the defendant was guilty of negligence in failing to stop the car at or near a street crossing, but that, as plaintiff was about to alight from a slowly moving car, 'the defendant carelessly and negligently started said car forward at an increased rate of speed.'" In other words, the declaration did not charge the appellant with negligence in failing to stop the car at or near the street crossing, but in carelessly and negligently starting the car forward at an increased rate of speed while it was moving slowly. It has been held by this court that it is not negligence per se to get on or off a slowly moving car, whether propelled by horse power or electricity or cable. *North Chicago Street Railroad Co. v. Williams*, 140 Ill. 275, 29 N. E. 672; *Cicero & Proviso Street Railway Co. v. Meixner*, 160 Ill. 320, 43 N. E.

823, 31 L. R. A. 331; North Chicago Street Railroad Co. v. Wiswell, 168 Ill. 613, 48 N. E. 407; Springfield Railway Co. v. Hoeffner, 175 Ill. 634, 51 N. E. 884.

The testimony of the appellee tended to show that, as the car neared Superior street, the plaintiff signaled the conductor to stop, and that in response to such signal he rang the bell, and the speed of the car was slackened, whereupon the appellee went to the platform, and, while standing upon the step waiting for the car to stop, she was, by its sudden starting up, thrown to the ground. On the contrary, the testimony of the appellant tended to show that the plaintiff did not give any signal for the car to stop, and that the car was moving slowly merely because there was a wagon on the track in front of it, and that she did not fall from the car, but stepped off of it voluntarily, and fell backwards. It is undisputed that, when the car neared the crossing, the appellee rose from her seat, and went to the back platform, and stood upon the step thereof with a view of alighting from the car. It was certainly the duty of the conductor to observe the appellee's signal, if she gave him a signal; and notice to the conductor of a desire to alight at that particular place may have been given not only by a signal, but by the movement of the passenger in arising from her seat, in going to the rear platform, and standing upon the lower step thereof. Some of the testimony tends to show that there was no person upon the back platform when the appellee left the car and went upon it with the view of alighting. Some of the witnesses, however, say that there were several persons upon the back platform besides the appellee at the time she fell from the car. The instructions, however, required the jury to find that the appellee could not recover unless she was in the exercise of due care for her own safety, and the giving of notice in some way to the conductor that she desired to alight was a part of and involved in her exercise of due care. In finding that she did exercise due care, the jury must have found that she gave a signal or other proper notice to the conductor. If, as announced in the instruction, the conductor was not guilty of negligence unless he had notice of the desire or intention of the appellee to alight from the car, then the converse of the proposition is true, that the appellee was not in the exercise of proper care unless she gave such notice. Therefore the question of notice, in view of the testimony given, was presented to the minds of the jury by the requirement, embodied in the instructions, that the appellee was under obligations to exercise due care for her own safety.

It is charged that the trial court erred in refusing to give the sixth instruction asked by the appellant. It appears that the appellee had an umbrella and one or more parcels or bundles in one of her hands. The sixth instruction told the jury that, if they believed from the evi-

dence that she was riding upon the lower step of the rear platform without having hold of the car, or any of its rails or bars or fastenings, so as to secure herself in such position, and if they believed that there were rails and bars and fastenings to which she could have held, the exercise of ordinary care and caution for her own safety required her to take hold of such rails or bars or fastenings, or otherwise protect and secure herself, and that, if she failed and neglected to do so, the jury should find the defendant not guilty. This instruction substantially told the jury that, if the appellee stood upon the step of the rear platform and did not hold on to the rail of the car to secure herself, she was guilty of contributory negligence. Such failure to make use of the rail or bar on the side of the car was a circumstance which the jury were authorized to take into consideration in determining the question whether or not she was in the exercise of due care, but it cannot be said that if she neglected to take hold of the rail she was thereby guilty of contributory negligence as matter of law. Consequently, there was no error on the part of the trial court in refusing to give the sixth instruction asked by the appellant.

Counsel for appellant complain of the first instruction given by the court to the jury on behalf of the appellee, upon the alleged ground that the jury were thereby authorized to compensate the plaintiff for the injuries which she was shown by the evidence to have suffered, regardless of the question whether such injuries resulted from the accident in question or not. We do not think that the instruction is capable of the construction thus placed upon it. There was some testimony tending to show that certain pains and sufferings which appellee endured after the injury were due to ailments with which she was afflicted before the injury occurred. But the instruction in question, when considered in connection with the other instructions and with the evidence, referred only to the injuries which the jury might believe, from the evidence, resulted from the accident, and not injuries due to the ailments in question.

Criticism is also made upon the third instruction given to the jury on behalf of the appellee, upon the ground that it authorizes the jury to notice and take into consideration the extent to which any one of the instructions given might be qualified by other instructions in the series of given instructions. We do not regard this as error, or as in any way submitting to the jury a question of law.

We have held that the instructions to the jury should be regarded as a connected series constituting a single charge and that, when they are so considered, it must be clear that the jury have been misled, or have drawn an improper inference from a single instruction, before the judgment will be reversed. *Chicago City Railway Co. v. Mead*, 206 Ill. 174 69 N. E. 19. We have held in substance that an ambiguous

Dallas Rapid Transit Co. v. Payne

instruction may be cured by another instruction which makes the ambiguous element clear. *McCommon v. McCommon*, 151 Ill. 428, 38 N. E. 145; *City of Lanark v. Dougherty*, 153 Ill. 163, 38 N. E. 892; *Day v. Porter*, 161 Ill. 235, 43 N. E. 1073; *Latham v. Roach*, 72 Ill. 179; *Village of Mansfield v. Moore*, 124 Ill. 133, 16 N. E. 246; *Hanrahan v. People*, 91 Ill. 142.

In *Latham v. Roach*, *supra*, we held that, even if there should be a doubt as to the proper construction of an instruction given on behalf of one party, yet, if the instruction given on behalf of the other party entirely removes such doubt, there is no error. And it has often been held that, where instructions are not contradictory of each other, one instruction may be cured by another instruction. This whole doctrine of the qualification of one instruction in a series by another instruction in the same series, or as to the curing of a slightly defective instruction by another instruction which is not defective, is without value or force if the jury have not the right among themselves to read and compare the instructions to see whether or not any one instruction of a series is qualified or cured in its defective character by another instruction in the series.

We find no error in the record which would justify us in reversing the judgment of the Appellate Court. Accordingly, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

DALLAS RAPID TRANSIT CO. v. PAYNE.

(Supreme Court of Texas, Nov. 7, 1904.)

[82 S. W. Rep. 649.]

Passenger—Alighting from Moving Street Car without Paying Fare.*

Plaintiff (a minor) and his friend boarded the running board of a street car on the side opposite to that on which the conductor was collecting fares, intending only to ride a short distance, and then to continue their journey by wagon. Plaintiff had money, and agreed to pay the fare for both. Plaintiff claimed that, after signaling the car to stop, the car slowed up but slightly, and then began to run faster, and he, believing it would not stop, stepped off, and was injured. It also appeared that plaintiff did not pay his fare before he alighted: *held*, that it could not be found, as a matter of law, that plaintiff, in good faith, intended to pay his fare, and hence it was error, in the instructions, to assume that plaintiff was a passenger.

Same—Negligence—Failure to Stop Car for Passenger to Alight.

Where, in an action for injuries to a person in alighting from a moving street car, his testimony that he rang the bell a number of times for the car to stop before he alighted was uncontradicted, and other passengers on the car testified, but failed to state anything with reference to the ringing of the bell, and the motorman was not called to answer whether he heard the bell or not, the court was justified in

*As to who are, and are not, passengers, see foot-note appended to *Radley v. Columbia Southern Ry. Co.* (Ore.), 12 R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153, where all the preceding authorities in this series are collected or referred to.

Dallas Rapid Transit Co. v. Payne

assuming that the company was guilty of negligence in failing to stop the car in response to the signal.

Same—Contributory Negligence—Alighting from Moving Car.†

Where a passenger on a street car signaled the car to stop for him to alight, and he testified that, on the car slowing up and then increasing its speed, he concluded it was not going to stop, whereupon he jumped off and was injured, the question of his contributory negligence was for the jury.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by R. L. Payne against the Dallas Rapid Transit Company. From a judgment in favor of plaintiff, affirmed by the Court of Civil Appeals (78 S. W. 1085), defendant brings error. Reversed.

Holloway & Holloway, for plaintiff in error.

Cockrell & Gray, for defendant in error.

BROWN, J. Robert L. Payne, a minor, by his next friend, H. C. Payne, instituted this suit in the district court of the Forty-Fourth District, at Dallas, to recover from the Dallas Rapid Transit Company for injuries alleged to have been received by the plaintiff, through the negligence of the company, while he was riding as a passenger upon the defendant's street railroad car in the city of Dallas on the 24th day of April, 1902. Defendant pleaded a general denial, and that the injury, if any was received, was caused by the contributory negligence of the plaintiff. The district court, by its charge, assumed that Payne was injured through the defendant's negligence, and that he was a passenger on the car at the time of the injury; and the court submitted to the jury only the questions of the amount of damages to be awarded, and whether or not the plaintiff had been guilty of contributory negligence.

Three questions are presented by this writ of error: First, does the evidence show conclusively that the plaintiff was a passenger on the defendant's car at the time of his injury? second, does the evidence show conclusively that the defendant was guilty of negligence which caused the injury received by the plaintiff? And, third, does the evidence show conclusively that the plaintiff's acts, as a matter of law, constitute contributory negligence? We will state the substance of the evidence which bears upon each of these questions:

Robert L. Payne lived in the country, about six miles from the city of Dallas, and, in company with Ben Connor and James Murdock, was in the city at the Confederate Reunion in April, 1902. Connor and Payne were intending to return to their homes on the wagon of Murdock, which was stationed some 200 yards from the station on defendant's road where the injury occurred. The three boys were near a gate of the

†See foot-note appended to *Paganini v. North Jersey St. Ry. Co.* (N. J.), 11 R. R. R. 14, 34 Am. & Eng. R. Cas., N. S., 14.

Dallas Rapid Transit Co. v. Payne

fair grounds at Dallas, and Murdock started to his wagon afoot, when Connor and Payne concluded to take a car to ride to the first station, about 1,150 feet distant. The reason why they wished to ride was that they were afraid they would be left by the wagon, and they took the car to make time in arriving at that point; intending to get off there, or the curve, which was still further on, and walk to the wagon. Connor had no money with which to pay his fare, but Payne had the money, and agreed to pay the fare for himself and Connor. The car on which they took passage was not crowded, there being unoccupied seats in it, but Connor took his place on the running board on the side of the car or the steps at the front platform on the outside of the car; and Payne testified that he was standing on the rear platform of the car, while Connor testified that Payne was standing on the steps of the rear platform most of the time; and Ed Freeman, a lawyer, who was on the car and observed the two boys, being acquainted with Connor, and having seen the accident by which Payne was hurt, testified that Connor was on the steps or the running board of the car, and that Payne was on the steps or the running board of the car all the time from the time he got on the car until he got off and received his injuries. There is no evidence to show that the conductor knew that those boys were on any part of the car. Each one of them testified that the conductor did not reach him in collecting the fares before Payne got off, and each testified that the conductor was on the opposite side of the car from them, collecting the fares from the passengers. Connor corroborated the statement of Payne with reference to the intention to pay the fare when the conductor should call for it. The agreement between the two boys was that they should get off at the first station. The plaintiff testified that, when he neared the station at which he intended to get off, he rang the bell to stop the car four or five times; and Connor testified that he saw Payne ring the bell the first time, and heard it ring at other times. An employee of the defendant company, an inspector of the road and cars, testified that Payne could have reached the bell cord from where he stood on the steps of the car. There is no evidence as to whether the conductor or motorman heard the bell ring, or any one else upon the car. The plaintiff was 14 years old in January before he was injured, in April. He testified that the reason he took passage on the car was that he was in a hurry to reach the wagon, for fear he might be left; that being his mode of travel home. Payne testified that, when he was nearing the station at which he was to get off, the car slowed up slightly, and then began to run faster, and that it was running very fast—he did not know its speed, but thought it was running as fast as it could—when, seeing that the car would not stop, he stepped off to the ground and received the injury; his leg bone being broken above the ankle joint.

Dallas Rapid Transit Co. v. Payne

Payne and Connor both testified that, before he made the step, Connor told him not to get off unless the car stopped—that he might get hurt. Ed Freeman, who was upon the car and observed the boys, testified that, at the time Payne got off the car, it was running quite slow—not more than six miles per hour.

In his charge to the jury, the judge of the district court assumed that Payne was a passenger on the car of the transit company, and that the employees of that company were negligent in failing to stop the car in response to the bell. To justify the charge, the testimony to establish such fact must not only be undisputed, but must be of such a conclusive character that there is no room for reasonable minds to differ as to the conclusion to be drawn from it. *Choate v. Ry. Co.*, 90 Tex. 88, 36 S. W. 247, 37 S. W. 319, and authorities cited. If Robert Payne had the money with which to pay his fair upon the defendant's car, and, intending to pay the fare and become a passenger, entered the car, and took his place upon that portion of it which was provided for carrying passengers, he thereby became a passenger, although the conductor of the car did not reach him in the course of collecting the fares. If, however, Payne, having the ability to pay his fare, and intending to become a passenger upon the defendant's car, got upon it at a place not provided for carrying passengers, and left it before the conductor reached him in the course of collecting the fares, then the plaintiff did not by his acts become a passenger upon the street car of the defendant company. *M., K. & T. Ry. Co. v. Williams*, 91 Tex. 255, 42 S. W. 855. In the case cited, *Williams*, intending to become a passenger on the passenger train of the railroad company, and having the money with which to pay his fare, got on the front part of the baggage car, because the train was in motion, and he had not time to get onto the passenger coach. While in this position he was injured by the fireman and engineer throwing hot water upon him, and in his suit for damages he claimed the protection due to a passenger. This court said: "If one who had no ticket enters the coach of a railroad company which is provided for the carriage of passengers, with the bona fide intention to take passage on the train, and with the intention and ability to pay his fare when called upon, and, being called upon, does pay his fare, such person becomes a passenger, and entitled to all the privileges and protection of such. This constitutes an implied contract on the part of the carrier to safely carry the passenger who has thus entered its car. But in order to raise such an implied contract, the party desiring to be carried by the railroad company must take passage on that part of the train provided by it for carrying passengers." The evidence in this case is not conclusive that Payne entered the car, but it strongly tends to prove that he was upon the steps or running board of the car, and therefore does not show

Dallas Rapid Transit Co. v. Payne

conclusively that he was a passenger upon that car. He testified that he could have had a seat in the car. This case differs from San Antonio Traction Co. v. Bryant (Tex. Civ. App.) 70 S. W. 1015, in this: in that case it was proved that the injured party was rightfully on the running board. If, when Payne got upon the car, he had the money to pay his fare, but did not intend to pay it, he did not become a passenger on the car. The fact that Robert Payne, with Ben Connor, boarded the defendant's car to ride about 1,150 feet, and that they did not enter the car and take seats where passengers usually sit, but stood upon the running board or steps of the car, and upon the opposite side from where the conductor was engaged in collecting the fares, and the fact that Robert Payne jumped from the car before the conductor reached him in the collection of fares, are circumstances from which a jury might conclude that he did not get upon the car in good faith intending to become a passenger and to pay his fare, but intended to ride the short distance, and to get off and avoid the conductor when he should come to collect his fare. The jury might have found that the defendant in error acted in good faith and intended to pay his fare, but the testimony is such that minds seeking the truth might differ in their conclusions as to Payne's intention. It follows that, in our opinion, the trial court erred in assuming that Robert Payne was a passenger upon the defendant's car.

Robert Payne and Connor both testified that Payne rang the bell a number of times for the car to stop. This testimony is uncontradicted, and we see no reason why the court should say that a jury might properly have disregarded it. There were many passengers on the car. One of them—a lawyer—testified in the case about the accident and the position and conduct of the boys, but failed to state anything with reference to the ringing of the bell, and the motorman who was upon the car at the time was not called to answer whether he heard the bell or not. In this state of the evidence, we think that the court properly assumed that the street car company was guilty of negligence in failing to stop the car in response to the usual signal of ringing the bell.

The plaintiff in error insists that the undisputed evidence shows that Robert Payne was guilty of contributory negligence which should defeat this action. In determining this question, we must consider the evidence in its aspect most favorable to defendant in error. We think a jury might find from the evidence that Robert Payne was a passenger on the car, and that the transit company was guilty of negligence in not stopping the car in response to the usual signal; and, considering the slow speed of the car, as testified to by Freeman, a jury might conclude it was not negligence for Payne to jump from the moving car.

It is ordered that the judgments of the district court and Court of Civil Appeals be reversed, and that the cause be remanded.

GARVEY *v.* RHODE ISLAND CO.

(Supreme Court of Rhode Island, March 19, 1904.)

[58 Atl. Rep. 456.]

Injury to Person Signaling Street Car—Car Overlapping at Curve—Assumption of Risk.

One who, after signaling an approaching street car which is about to round a curve, places himself in such close proximity to the track that he will inevitably be struck by the overhang of the car when it rounds the curve, assumes the risk incident to the dangerous position which he has taken, and cannot hold the street railroad company liable for his injuries.

Same—Same—Passengers—Inception of Relation.*

One who signals an approaching street car which is rounding a curve has no right to assume that the car will stop at any particular point on the curve, and until he is given to understand by some act of the motorman or conductor that he can safely attempt to board the car, or until the conditions are such that he can do so, the street railroad company is under no legal duty to him.

Same—Same—Speed—Proximate Cause.

The act of one who places himself within the reach of the overhang of a street car as it rounds a curve, and not the subsequent act of the motorman of the car in accelerating its speed, is the proximate cause of injury to such person resulting from being struck with the overhang of the car.

Case for negligence by Rose A. Garvey against the Rhode Island Company. On demurrer to the declaration. Sustained.

Argued before STINESS, C. J., and TILLINGHAST and DUBOIS, JJ.

Richard E. Lyman, for plaintiff.

Henry W. Hayes, Frank T. Easton, and Lefferts S. Hoffman, for defendant.

TILLINGHAST, J. The material allegations of the plaintiff's declaration are that, being desirous of boarding one of the defendant's street cars in Providence at the place known as "Turk's Head," she signaled the motorman of the car of her desire to take the car while it was rounding the curve at said point, and that, in consequence of her signal, the car was slowed down and nearly brought to a standstill on said curve, whereupon the plaintiff walked towards it for the purpose of boarding it when it came to a standstill. The declaration then alleges that it became the duty of the defendant to then bring the car to a standstill, so that plaintiff might board the same with safety, but that the defendant negligently disregarded this duty, and, while the plaintiff was standing in the street, near to said curve, waiting for the car to stop, she being in the exercise of due care, the motorman

*As to who are, and who are not, passengers, see foot-note appended to *Radley v. Columbia Southern Ry. Co. (Ore.)*, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153.

Garvey v. Rhode Island Co

suddenly increased the speed of the car around said curve, thereby causing the rear end of the car to swing or kick out over that part of the street where the plaintiff was standing, and strike against her, whereby she was thrown down and injured.

The defendant demurs to the declaration on the grounds (1) that it appears thereby that she voluntarily assumed a position of danger, relative to said car; (2) That the plaintiff was negligent in assuming a position of danger, relative to said car, before it had come to a standstill; and (3) that the declaration does not set forth any legal duty owing by the defendant to the plaintiff. We are of the opinion that all of the grounds of demurrer are well taken.

By voluntarily assuming a position of danger, relative to said car, the plaintiff assumed the risk incident thereto. And although the speed of the car was being slackened in response to her signal before she assumed the position of danger on said curve, yet, as it had not come to a standstill, she had no right to infer that it would do so at any particular point on the curve, and hence she had no right to take a position where the swing or overhang of the car would come in contact with her person. It is to be noted in this connection that the plaintiff was not attempting or intending to board the car while it was in motion, but to wait until it came to a standstill. And hence it was her plain duty not to get in the way of the car, or of any part thereof, while it was in motion. That the plaintiff knew that the position which she took while the car was rounding the curve was a dangerous one must be presumed, as every person who is of sufficient intelligence to be capable of being left alone in the streets must be presumed to take notice of the obvious fact that the body of a street car, in rounding a curve, must necessarily swing out some little distance from the track on the outside of the curve. And for one to place himself within reach of the swing or overhang of a car while it is in motion is as much a bar to his recovery in an action against the company as though he had negligently placed himself in front of a moving car, and been injured thereby. Indeed, the former act would seem to be a stronger bar to his recovery than the latter, for, when one negligently places himself in front of a moving car, the motorman, who is in a position to see him, is bound to avoid injuring him, if possible, notwithstanding his own negligence. But where one places himself in such a position that the motorman is unable to see him, as must have been true in the case at bar, and is hit by the swing or pick of the rear part of the car when rounding a curve, we fail to see how any liability can be fastened upon the company.

Again, we fail to see that the defendant was guilty of any negligence in the premises. Even assuming that, from the act of the motorman in slackening the speed of the car in re-

Garvey v. Rhode Island Co

sponse to the plaintiff's signal, she had the right to assume that it would stop shortly, and while on the curve, yet, as already suggested, she had no right to assume that it would stop at any particular point on the curve, nor was it the duty of the motorman to stop at any particular point thereon. And until the plaintiff had been given to understand by some act of the motorman or conductor that she could safely attempt to board the car, or at any rate until the conditions were such that she could do so, the defendant owed her no legal duty.

But counsel for the plaintiff places much stress upon the fact that, after the speed of the car had been slackened in response to the signal to stop, its speed was suddenly accelerated, and that this was the proximate cause of the plaintiff's injury. We do not see that this is so. Having placed herself within the reach of the overhang of the car, as the plaintiff did, it was inevitable that it would strike her if it did not stop and she remained in that position. So that the mere fact that the speed of the car was subsequently accelerated was not the proximate cause of the accident, as it must have happened in any event, except as above stated. And hence it would seem to be clear that the plaintiff's negligence was the proximate cause thereof.

The plaintiff's counsel admits that he has been unable to find any reported case based upon facts like those relied on by him in the case at bar, but he strenuously argues that a close analogy exists between this case and that class of cases which involve the question of boarding a street car while it is in motion, and that the universal current of authority in this country is to the effect that it is not negligence per se for a person to attempt to board a moving street car. In support of this contention, counsel cites, amongst others, the following cases: *Corlin v. St. Ry. Co.*, 154 Mass. 197, 27 N. E. 1000; *Gordon v. St. Ry. Co.*, 175 Mass. 181, 55 N. E. 990; *Davey v. St. Ry. Co.*, 177 Mass. 110, 58 N. E. 172; *Sexton v. St. Ry. Co.*, 40 App. Div. 26, 57 N. Y. Supp. 577; *Eppendorf v. Ry. Co.*, 69 N. Y. 195, 25 Am. Rep. 171; *Morrison v. St. Ry. Co.*, 130 N. Y. 166, 29 N. E. 105; *Distler v. L. I. R. R. Co.*, 151 N. Y. 424, 45 N. E. 937, 35 L. R. A. 762; *Johnson v. West Chester R. R. Co.*, 70 Pa. 357; *Powelson v. United Traction Co.*, 204 Pa. 474, 54 Atl. 282; *Sahlgaard v. St. Paul Ry. Co.*, 48 Minn. 232, 51 N. W. 111; *Citizens' St. Ry. Co. v. Merl*, 26 Ind. App. 284, 59 N. E. 491; *Conner v. St. Ry. Co.*, 105 Ind. 62, 4 N. E. 441, 55 Am. Rep. 177; *B. & O. Ry. Co. v. Kane*, 69 Md. 11, 13 Atl. 387, 9 Am. St. Rep. 387; *N. Y. P. & N. R. R. Co. v. Coulbourn*, 69 Md. 360, 16 Atl. 208, 1 L. R. A. 541, 9 Am. St. Rep. 430; *White v. St. Ry. Co.*, 92 Ga. 494, 17 S. E. 672; *North Birmingham Ry. Co. v. Liddicoat*, 99 Ala. 545, 13 South. 18; *L. R. & F. S. Ry. Co. v. Atkins*, 46 Ark. 423; *Central Pass Ry. Co. v. Rose* (Ky.) 22 S. W. 745; *North Chicago St. Ry. Co. v. Williams*, 140 Ill.

Miller v. Southern Ry. Co

275, 29 N. E. 672; Wyatt v. Railway Co., 55 Mo. 485; Fulks v. St. L. & San Fran. Ry. Co., 111 Mo. 335, 19 S. W. 818; Omaha St. Ry. Co. v. Martin, 48 Neb. 65, 66 N. W. 1007; Finkeldey v. Omnibus Cable Co., 114 Cal. 28, 45 Pac. 996; Woo Dan v. Seattle Electric Ry. Co., 5 Wash. 466, 32 Pac. 103. While an examination of these cases shows that they fully sustain the proposition of law that it is not necessarily a negligent act to attempt to board a street car while it is in motion, yet we fail to see that there is any such analogy between those cases and the one before us as to make them controlling on the question here in issue. For, as already said, the plaintiff was not attempting to board the car at the time she was injured, but was simply waiting for it to come to a standstill in response to her signal. And we think it is clearly the duty of a would-be passenger, under such circumstances, to take a position outside of the reach of the passing car.

The demurrer is sustained, and the case remanded to common pleas division for further proceedings.

MILLER v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, April 29, 1904.)

[48 S. E. Rep. 99.]

Carriage of Passengers—Delay.

In an action by a passenger to recover because of delay in the movement of a train, evidence that it was due to leave a station 20 minutes late, and did so leave, and after moving about 100 yards returned to the station, where it remained for 10 hours, is sufficient to prevent a non-suit, where no information was given the passengers as to the probable duration of the delay or the cause thereof.

Same—Same—Punitive Damages—Instruction.

In an action by a passenger to recover for delay of a train, on evidence that it remained at a station for some 10 hours, and that the conductor of the train refused to give the passengers any information as to the probable extent of the delay or the cause thereof, an instruction that defendant was not liable for punitive damages was properly refused as a charge on the evidence.

Appeal—Exceptions.

Where an exception on appeal refers to another exception for specifications of error, it will not be considered.

Failure to Run Train on Schedule Time.

It is a part of a contract of a railroad company with the public that its trains will be run on schedule time, so as to render it liable to a passenger for failure to do so.

Passengers—Delay—Punitive Damages.*

Where a train is delayed, a passenger is not entitled to punitive damages, unless defendant's conduct was willful, malicious, and wanton

*As to what damages are recoverable for delay in carrying a passenger, see Yazoo & M. V. R. Co. v. Smith (Miss.), 9 R. R. R. 579, 32 Am. & Eng. R. Cas., N. S., 579 (sufficiency of evidence to warrant punitive damages for carrying beyond station); Kansas City, Ft. S. & M. R. Co. v. Dalton (Kan.), 6 R. R. R. 187, 29 Am. & Eng. R. Cas., N. S., 187

Miller v. Southern Ry. Co

Same—Same—Damages.*

Where a train is delayed, a passenger is not entitled to actual damages, unless defendant's conduct was willful and negligent.

Same—Same—Same.*

Where a train is delayed, a passenger is not entitled to actual damages, unless he shows some pecuniary injury or personal injury.

Same—Same—Same.*

A passenger is not entitled to damages for inconvenience, loss of time, or fatigue caused by the delay of a train, unless it has produced some pecuniary damage or personal loss resulting.

New Trial.

Refusal of a new trial for insufficient evidence will not be considered on appeal.

Appeal from Common Pleas Circuit Court of Greenville County; Purdy, Judge.

Action by H. W. Miller against the Southern Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

T. P. Cothran, for appellant.

Lewis Dorroh, for respondent.

POPE, C. J. On the 7th day of November, 1902, the plaintiff, residing in the city of Greenville, was in the city of Spartanburg on business, and at night applied to the local agent of the defendant in Spartanburg for a ticket on train No. 35, to go to Greenville. The said local agent informed the plaintiff that train No. 35 was 20 minutes late, but sold him a ticket. This train, No. 35, was a through passenger train from Spartanburg to Greenville—a distance of about 30 miles. Said train arrived about 20 minutes late, and the plaintiff, with a goodly number of other passengers, got on board, when said train moved about 100 yards towards Greenville and then stopped, and so remained until next morning, about 10:30 o'clock, after which it proceeded to Greenville, reaching the latter about 11:10 o'clock. The plaintiff applied to the conductor

(elements of damages for carrying passenger beyond her destination at night); note, 18 Am. & Eng. R. Cas., N. S., 45 (mental suffering of passenger carried beyond destination); note, 2 Am. & Eng. R. Cas., N. S., 185 (carrying passenger beyond destination); Louisville & N. R. Co. v. Quick (Ala.), 20 Am. & Eng. R. Cas., N. S., 25 (anxiety and physical injury caused by exposure to weather may be elements of damages for carrying passenger beyond her destination); Louisville, etc., R. Co. v. Guy (Ky.), 6 Am. & Eng. R. Cas., N. S., 774 (excessive verdict for carrying passenger beyond destination); St. Louis, I. M. & S. Ry. Co. v. Power (Ark.), 16 Am. & Eng. R. Cas., N. S., 1 (recovery for inconvenience of passenger who voluntarily returns to his destination in a freight train after having been carried beyond it); Southern Ry. Co. v. Hardin (Ga.), 10 Am. & Eng. R. Cas., N. S., 250 (failure to stop at destination); Judice v. Southern Pac. R. Co. (La.), 2 Am. & Eng. R. Cas., N. S., 185 (measure of damages for failure to stop at destination).

As to the damages recoverable for failure or refusal to carry a passenger, see foot-note appended to Schmidt v. Cleveland, etc., Ry. Co. (Ky.), 12 R. R. R. 149, 35 Am. & Eng. R. Cas., N. S., 149.

See () on page 33.

Miller v. Southern Ry. Co

twice to know when the train would start, and received no definite information, and when he applied to the conductor to know if the passengers could not be transferred to another train which could take the passengers on to Greenville, the conductor replied that they had no such orders. He then asked such conductor if the train upon which he and other passengers were seated could not be sent on to Greenville by way of Larens, and the conductor replied that he had no such orders. The plaintiff's anxiety to reach Greenville was because he was state superintendent of an insurance company, for which he had important business engagements for the next morning. He reached Greenville, but found that his business engagements could not be and were not attended to, owing to his failure to reach Greenville on time. The plaintiff brought his action against the defendant to recover his damages, which he fixed at \$500.

Inasmuch as the defendant demurred to the complaint, it is necessary that such complaint shall be set out. It was as follows, omitting its caption and opening words: "(1) That Southern Railway Company, defendant, was at the time hereinafter mentioned and still is a corporation created under the laws of the state of Virginia, and as such has power to sue and to be sued, and is a common carrier, and is engaged in carrying passengers in railway trains for hire from point to point along certain railway lines in South Carolina, among other lines that passing through the city of Spartanburg. (2) That before and at the time herein named defendant operated its trains by a schedule, according to which its train No. 35 left Spartanburg at the hour of 12:20 a. m., and arrived at Greenville at the hour of 1:20 a. m.; that said train had been so run for a long time, and the fact was a matter of common knowledge, and defendant published said schedule in newspapers and posted said schedule on bulletin boards at its stations, and otherwise advertised said schedule. (3) That November 7, 1902, plaintiff, who lives in Greenville, was in Spartanburg, and, desiring to return to Greenville and relying upon defendant's said schedule, he presented himself at the ticket office in defendant's depot in Spartanburg for the purpose of securing passage to Greenville on train No. 35. (4) That plaintiff was then and there informed by defendant's servant and agent, the ticket agent in said ticket office, that train No. 35 would arrive 20 minutes late, and would leave for Greenville 20 minutes after the hour of 12:20, its schedule time. (5) That, relying upon said ticket agent's statement, plaintiff then purchased from said ticket agent a ticket for Greenville, and, upon the arrival of said train No. 35 a few minutes later, entered one of the cars of said train No. 35 as a passenger. (6) That said train No. 35, with plaintiff and others as passengers, did not leave for Greenville at 20 minutes after the hour of 12:20, its schedule time, but by reason of defendant's carelessness, wantonness, reck-

Miller v. Southern Ry. Co

lessness, and negligence, and its disregard of the duty it owed to its passengers and to the public, said train was made or permitted to lie in the depot at Spartanburg for 10 hours or more, leaving at last between the hours of 10 a. m. and 11 a. m., and arriving at Greenville at the hour of 11:10 a. m.

(7) That while said train No. 35 lay in the depot at Spartanburg, as stated, plaintiff repeatedly asked defendant's servant and agent, the conductor of said train No. 35, when said train would leave, but said conductor wantonly and recklessly refused to give any information in answer to said request, leaving plaintiff in ignorance as to when said train would start for Greenville, and not knowing but what it would start at any minute, and thereby requiring him to remain in the depot at Spartanburg, prepared and ready to leave, the whole of the 10 hours or more that said train lay in said depot. (8) That by reason of said train's delay, caused as aforesaid, and by reason of being required to wait so long at said depot at Spartanburg, caused as aforesaid, plaintiff missed an important engagement in his office in Greenville, and suffered great annoyance, anxiety, inconvenience, and discomfort, and arrived at his office in Greenville too late to attend to his regular morning's work, and too tired to do any work, all to his damage \$500. Wherefore plaintiff prays judgment against defendant for the sum of \$500 and the costs of this action."

The defendant demurred to the complaint herein upon the ground that it does not state facts sufficient to constitute a cause of action. "Specifications: (1) The claim for punitive damages cannot be sustained, for the reason that no actual injury is alleged to have been inflicted on or suffered by plaintiff. *Watts v. Ry.*, 60 S. C. 72, 38 S. E. 240. (2) The claim for actual damages cannot be sustained for the reason that none are alleged. The statement that plaintiff missed an important engagement and suffered great annoyance, anxiety, inconvenience, and discomfort, is too remote, uncertain, and speculative. *Martin v. Ry.* (S. C.) 10 S. E. 960; *R. Co. v. Hayden*, 51 Am. Rep. 274. (3) No notice to defendant of any special damage claimed is alleged. *Mood Tel. Co.*, 40 S. C. 524, 19 S. E. 67."

The circuit judge, Judge Purdy, passed the following order overruling the demurrer: "On the call of this case for trial, the defendant interposed a demurrer to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, and submitted specifications of the grounds in writing. As these specifications are in the record, it will be unnecessary to set them forth here. The plaintiff resided in Greenville, and had occasion to visit Spartanburg on business, leaving Greenville in the early evening, expecting to leave Spartanburg at 12:20 at night. He alleges in his complaint that the defendant had advertised that its train left Spartanburg at 12:20 at night, and that this fact was known to the public generally, as well as to himself, and that, in

addition to relying upon this statement, he asked the ticket agent at Spartanburg concerning this train, and was informed that the train was 20 minutes late, and thereupon he purchased a ticket for Greenville. He further alleges that the train came in at the time stated by the agent, and that he went aboard of same, but that defendant either held or permitted the train to remain in the depot till 10 o'clock next morning, without giving him any reason or explanation for so doing; and he charges that this was carelessly, recklessly, wantonly, and negligently done, in utter disregard of plaintiff's rights and the defendant's duty to the public. The complaint further charges that by reason of the premises the plaintiff was obliged to remain in the depot all night without sleep, to his great annoyance and inconvenience, and that he arrived home too late to attend to his regular morning's work, and too much fatigued to attend to any business, and besides missed an important engagement, and concludes by demanding \$500 damages. The demurrer cannot be sustained. While the facts set out in the complaint allege breach of contract, they at the same time show a breach of duty to the public amounting to a tort (*Heirn v. McCaughan* [Miss.] 66 Am. Dec. 600; *Memphis & Charleston Railroad Co. v. Green*, 52 Miss. 779; *Butler v. Telegraph Company*, 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893); and from the nature of the act damages are implied (8 A. & E. Ency. of Law, 551). A cause of action is alleged for punitive damages, and, if the facts alleged can be proved, punitive damages may be awarded. *Gilman v. F. C. & P. R. R.*, 53 S. C. 210, 31 S. E. 224; *Fort v. Southern Railway Co.*, 64 S. C. 423, 42 S. E. 196. "It is therefore ordered that the demurrer be, and the same is hereby, overruled."

The defendant thereupon filed its answer, wherein it denied all the allegations of the complaint. The case then went to trial. The defendant then admitted the allegations of paragraphs 1 and 2 of the complaint. The plaintiff then introduced his testimony. At its conclusion the defendant moved for a nonsuit on the following grounds: "(1) The claim for punitive damages cannot be allowed, for the reason that there is no evidence tending to show any actual damage. *Watts v. Railway*, 60 S. C. 72, 38 S. E. 240. (2) There is no evidence tending to show such conduct on defendant's part as will justify the allowance of exemplary damages. *Fort v. Railway*, 64 S. C. 423, 42 S. E. 196. (3) There is no evidence tending to show any actual damages, the proximate result of defendant's alleged negligence. (4) The evidence fails to show any unreasonable delay on defendant's part which would be the basis of a recovery for damages. (5) The evidence fails to show that the delay was due to the negligence of defendant. 2 Wood, 313. (6) The evidence does not tend to show that the defendant had notice of the special damage claimed. (7) The evidence does not show

Miller v. Southern Ry. Co

any actual pecuniary damage sustained by plaintiff. *Mood v. Tel. Co.*, 40 S. C. 524, 19 S. E. 67; *Georgia R. R. v. Hayden* (Ga.) 51 Am. Rep. 274."

The circuit judge denied the motion in the following order: "As to what may be dependent on the part of the defendant by way of an excuse by not carrying out the contract, if the plaintiff has not made a contract, I cannot anticipate. It may have a perfect defense to the alleged violation of the contract. It is a question of fact for the jury, and I do not think that I would be warranted in granting a nonsuit. It is a question of fact for the jury, and the railroad company may be able to prove it. By Counsel for Defense: Your honor did not rule on the special damage. They have not proved any willfulness and wantonness in their testimony. We make the point here in the motion for a nonsuit that they have offered no testimony as to willfulness and wantonness, and, when it comes to actual damage or ordinary negligence, that there is no testimony by which the jury could ascertain how much the man was damaged. By the Court: Under the act of the Legislature, I think it is their intention to recover either actual or exemplary damage in a case of this kind, or, in fact, all cases suing in tort. What proof might be offered, I do not think there is any doubt but that the case of *Fort v. Railroad* states clearly that the case would be in the discretion of the court. It seems to me that it would be a question of fact for the jury to say whether or not there was any willfulness and wantonness, violative of the contract to bring the plaintiff to Greenville, or any negligence of duty in keeping the party in there until 10 o'clock the next morning, and I think it is incumbent on the defendant to show, and I think punitive or actual damage can be recovered."

Counsel for plaintiff made the following statement: "Counsel for plaintiff admits that he claimed no special damages and no pecuniary loss, but he claimed that the delay itself, with the consequent annoyance, anxiety, inconvenience, discomfort, and fatigue, was a wrong, entitling him to actual damages, and that the conduct of the defendant in the whole matter, with the consequent annoyance, anxiety, inconvenience, discomfort, and fatigue, warranted an award of exemplary damages."

The defendant offered no testimony.

The following is the charge to the jury by circuit judge:

"The plaintiff, complaining, alleges that he entered into a contract with the defendant, acting as a common carrier, to transport him from Spartanburg to Greenville, and that he was greatly delayed in reaching that point, and he alleges that the act done by the defendant was wanton and willful, and in disregard of his right. The charge is that the defendant failed to discharge its duty to him, to his damage in the sum of \$500; and, if you find for the plaintiff, you cannot find a verdict exceeding that amount. There is no charge of what

is called 'special damage.' To illustrate: Where a person is injured, and he suffers any special damage from the injury, by reason of the injury, as a part of the damage, he can set out the particulars in which he was damaged. As an illustration: A man might say: 'I was getting \$10 per day, and I was prevented from performing that duty by reason of another person not doing his duty to me.' In this case, they do not claim any special damage, and any special damage that the plaintiff might have sustained by missing any engagement was ruled out, and is not before you, and is not to be considered by you. There is one kind of damages known in law as 'damage implied,' from the unlawful act of another. Unless there is proof of some substantial damage, you can only give nominal damages, where there is some unlawful act. A common carrier owes a duty to the public, and the violation of that duty is such an act as will support the damages, as damages resulting to the one who had a contract with the defendant, if that contract has been violated.

"The plaintiff requests me to charge you the following propositions of law:

"(1) The published schedules or time-tables of a railway company are the representations to the public as to the time of departure of its trains and of the periods within which their journeys will be performed. They are public professions, up to which it must use diligence to act, and, if it fail to perform its trips according to them, it will be liable to the passenger, unless it shows that it has made reasonable exertions to do so, and has been prevented by accidents and delays not attributable to its negligence.' Modification: And in order to exempt itself from liability it must show that it exercised due care to prevent the delay.

"(2) A railway company is chargeable with damages for delay in running its trains according to schedule time, and nothing but accidents resulting from causes which reasonable care could not have provided against will excuse liability to the passenger for damages. If the conduct of the railway company is such as to show a wanton or willful disregard of duty to such passenger, exemplary or punitive damages may be awarded.

"(3) Willful acts, for which exemplary damages may be awarded, may be shown by evidence of the recklessly omitting or neglecting to do something, the failure to do which shows gross or utter disregard.

"(4) Exemplary or punitive damages are awarded as a punishment to a wrongdoer, and as an example and warning to the wrongdoer and others.

"(5) The neglect of a railway company to run its train according to its schedule may be in itself an unlawful act. When an act which is in itself unlawful is committed, the law will presume that damages follow as a necessary consequence thereof, and no special damages need be proven.

“(6) When a railway company has failed to carry a passenger to his destination by the time fixed in its published schedule, the burden is upon the railway company to prove that it has made every proper effort to prevent the delay. If it fail to prove this, it will be liable to the passenger for damages.

“(7) Where a railway train is delayed by an obstruction on the track, the law presumes that the obstruction on the track is caused by the fault of the railway company, and the burden is upon the railway company to prove that the obstruction on the track was caused by inevitable accident or other causes which could not have been prevented by due care and foresight. If it fail to prove this, it will be liable to the passenger for damages.

“(8) Where a delay happens from the breaking down of any of the cars, engines, roadway, or other appliances or equipments under the control of the railway company, or is caused by the mismanagement or misconstruction of something over which the railway company has control, the law presumes that the same was caused by the negligence of the railway company, and the burden is upon the railway company to disprove this presumption, and, if it fail to disprove, it will be liable to the passenger for damages, if damages result therefrom to a passenger.

“(9) A railway company is bound by the representations of its ticket agent to the purchaser of a ticket, provided the representations were made at the time of the sale of the ticket.” Charged.

“The defendant requests me to charge you the following propositions of law:

“(1) The plaintiff is not entitled to punitive damages unless the defendant’s conduct was willful, malicious, wanton, or so reckless as to evince an utter disregard of the plaintiff’s rights.

“(2) The plaintiff in this case has adduced no facts from which the jury could conclude that the alleged conduct of the defendant was willful, malicious, wanton, or so reckless as to evince an utter disregard of the plaintiff’s rights.

“(3) The jury is instructed that, under the testimony in this case, the defendant is not liable for punitive damages.

“(4) The plaintiff is not entitled to actual damages unless the defendant’s conduct was willful or negligent.

“(5) The plaintiff is not entitled to actual damages unless he has established some pecuniary damages or some personal injury resulting in loss.

“(6) The plaintiff in this case has adduced no testimony tending to show that he has sustained any pecuniary damage or personal injury resulting in loss.

“(7) In the absence of direct proof of substantial damages as the result of breach of contract or tort, the damages implied by law can be only nominal.

“(8) Plaintiff is not entitled to damages for inconvenience, loss of time, and fatigue, unless it has produced some pecuniary damage or personal injury resulting in some actual loss.’ Second and third requests refused, and the others charged.

“Now, Mr. Foreman and gentlemen, as I said before, in a case of an unlawful act, the law implies some damage; but, without some substantial damage, such damage can only be nominal, and what the amount would be is a question of fact for the jury to conclude from the testimony brought out on the stand. There are two kinds of damages—actual damage, damage for the actual injury sustained, and punitive damage. Now, suppose a person would come and steal your horse from the stable, and the horse was worth \$100, you would sustain a damage of \$100. That would be your actual damage, and what you would be injured. And if the act was committed wantonly, willfully and recklessly, and in utter disregard of the plaintiff’s right, the jury can give punitive damages; but if it was not done willfully, wantonly and recklessly, and in disregard of the rights of another, there can be no punitive damages. There must be willfulness, wantonness, recklessness, and utter disregard of the rights of the other person, before the party that inflicted the injuries can suffer damages by way of punishment. If the defendant did an unlawful act towards the plaintiff, if it has, then damages would be implied, giving the necessary damages as the result of that act under the testimony brought out on the stand. Unless there has been some testimony as to damage, the damages could only be nominal; that is, if the defendant here is guilty of an unlawful act toward the plaintiff and inflicted an injury upon him, if you find that the defendant was guilty of an unlawful act towards the plaintiff, and that it has been done wantonly, willfully and in a reckless manner, he would be entitled to punitive damages, to punish the defendant by way of compensation to him—the main object being to punish the defendant. If you find for the plaintiff, write your verdict in dollars and cents on the back of the complaint; and if you find for the defendant, say, ‘We find for the defendant.’ As I said in the outset, there has been no actual damage proven here, and if you find that the act was committed, and that it was committed willfully, wantonly, and recklessly, and in utter disregard of the plaintiff’s right, punitive damages may be added.

“By Counsel for Defense: Will your honor explain to the jury the meaning of nominal damages? I don’t know that the jury understands the meaning of the term ‘nominal damages.’” Counsel then read to the court the following extract from 8 A. & E. Enc. L. 542, and requested that it be charged: “Damages may be further classed as either nominal or substantial; the former being a trifling sum, and awarded where a breach of duty or an infraction of the plain-

Miller v. Southern Ry. Co

tiff's right is shown, but no serious loss is proved to have been sustained," and added, "Under this law, nominal damages might be \$5 or ten cents, or some such amount."

"By the Court: I could not explain nominal damages. The jury understands the meaning of nominal damages. If you come to the conclusion that the defendant is liable, you are not to consider any damages the plaintiff sustained by missing any engagement, because that was ruled out. If you come to the conclusion that the defendant is liable, you consider, first, what damages to give him, and then you say, is there any proof of any substantial damages from the facts and circumstances in the case? If so, you can give that; but, if there are no facts to show any actual damages suffered, then you can only give nominal damages. I can't tell you what that would be. If you come to the conclusion that the act was done willfully, wantonly, and recklessly, then you say how much damages you are to put on the defendant as punishment, I say; that is, if you come to the conclusion that the plaintiff is entitled to recover. Take the record, and if you find for the plaintiff, write your verdict out in dollars and cents; and, if you find for the defendant, say, 'We find for the defendant,' and sign your name as foreman."

The jury having returned a verdict of \$50 for the plaintiff, the defendant then moved for a new trial on the minutes of the court. The circuit judge denied the motion. His order was: "The trial in this case resulted in a verdict for the plaintiff for \$50. I charged the jury that, in the absence of proof of substantial damages, the jury could only give nominal damages, having told the jury that they could not give any special damages, as there was no allegation or proof to warrant the same. But I also charged the jury that, if they believed that the plaintiff had suffered loss or damage under such circumstances as would warrant punitive damages, having fully related such circumstances as would warrant punitive damages, they might award such damages. The attorneys for the defendant move for a new trial on the minutes of the court. In their argument before me they contend that the jury did not give nominal damages, which might arise by implication, but had given punitive damages, as shown from the verdict, and that there is no proof in the record to sustain this verdict, and that the verdict is excessive. I cannot agree with the counsel. It appears from the testimony that the plaintiff went to the depot at Spartanburg to take the train for Greenville, relying upon the advertisement that the train would leave at 12:20 at night, and before purchasing a ticket was informed that the train would be 20 minutes late. He purchased the ticket and boarded the train on its arrival, which was about 20 minutes after its schedule time, and the train pulled out, and, after going about 100 yards, came to a stop and came back to the depot, where it remained until 10 o'clock the next morning, during which time the plaintiff

stated that he received no satisfactory information from the defendant. He states that after day-light he ascertained that there had been a wreck ahead, and he attributed the delay to this cause. It was the duty of the defendant to safely transport the plaintiff to his destination, in accordance with his contract, within a reasonable time. This it failed to do. The fact that there was a wreck does not, in itself, excuse the defendant; for it might have adopted some means to obviate the delay, even if there had been such wreck. It appears that the plaintiff had to remain about the depot in great discomfort for 10 or 12 hours, by reason of a state of facts wholly within the knowledge of the defendant, and which were not communicated to the plaintiff, and which, if communicated, might have permitted the defendant to have avoided much of the annoyance and inconvenience necessarily suffered by him under the circumstances. I think the jury were justified in saying that the defendant showed an inconsiderate and reckless disregard for the rights of the plaintiff, and I cannot disturb the verdict, and therefore it is ordered, that the motion for a new trial be, and the same is hereby, refused."

Thereupon the defendant appealed to this court on 21 exceptions, but, as it abandoned in writing those numbered 1, 2, 3, 4, 7, 8, 19, and 20, we will omit such abandoned exceptions and reproduce all the others:

Motion for nonsuit: "(5) Error of the presiding judge in refusing the defendant's motion for a nonsuit, upon the ground that the claim for punitive damages cannot be allowed in the absence of testimony tending to show any actual damage to plaintiff. (6) Error of the presiding judge in refusing the defendant's motion for a nonsuit upon the ground that there is no evidence tending to show such conduct on the defendant's part as will justify the allowance of punitive damages. (9) Error of presiding judge in refusing the defendant's motion for a nonsuit, upon the ground that the evidence fails to show that the delay was due to the negligence of defendant. (10) Error of presiding judge in refusing the defendant's motion for a nonsuit, upon the ground that the evidence does not show any actual pecuniary damages sustained by plaintiff."

Judge's charge: "(11) Error of presiding judge in charging the plaintiff's third request to charge, in that the charge allowed the recovery of punitive damages for gross negligence. (12) Error of presiding judge in charging the plaintiff's fifth request to charge, in that nominal damages only are presumed to follow the failure of a railway company to run its train according to schedule. Actual damages, as well as special damages, must be alleged and proved. The charge permitted the jury to assess actual, as well as special, damages without any proof thereof. (13) Error of presiding judge in charging plaintiff's sixth request, in that: (a) The action is based upon an alleged failure of duty. The burden

was upon the plaintiff to prove his allegations. (b) Even if negligent, the defendant would be liable, not for damages generally, but only for actual damages, or for nominal damages, if no actual damages were proved. (14) Error of presiding judge in charging plaintiff's seventh request, in that: (a) Same as in preceding exception. (b) Same as in preceding exception. (15) Error of presiding judge in refusing defendant's second request to charge, in that the request contained a correct statement applicable to the case. (16) Error of presiding judge in refusing defendant's third request, in that the request contained a correct statement applicable to the case. (17) Error of presiding judge in charging the jury that, if the defendant's conduct was willful, wanton, and reckless, the plaintiff was entitled to punitive damages. The plaintiff under no circumstances is entitled to punitive damages, but the imposition thereof should always be left to the exercise of the jury's discretion. (18) Error of presiding judge in refusing the request of defendant to explain to the jury the meaning of nominal damages; and in holding: 'I could not explain nominal damages. The jury understands the meaning of nominal damages.'"

Motion for new trial: "(21) Error of presiding judge in overruling the defendant's motion for a new trial: (a) All actual damages were out of the case, as the circuit judge held. (b) The verdict was for punitive damages, and there was no evidence in the case of willful tort or reckless conduct justifying punitive damages. (c) Nominal damages were not claimed in the complaint. (d) Error in holding that 'the jury were justified in saying that the defendant showed an inconsiderate and reckless disregard of the rights of the plaintiff,' there being no testimony to support this opinion."

1. We will now pass upon the grounds of exceptions. This case fairly illustrates the wisdom of our state Constitution in guarantying to every suitor a fair and speedy trial. There has been no unnecessary delay, and one motive we had in making a full showing of every step in the trial of the case has been to show that the trial was full and fair. We have been so much impressed with the evident desire of the circuit judge to pass seriously upon every point made, and with his success in such effort, that we could well adopt his deliverances upon each as our own conclusions; but we will endeavor briefly to pass upon the exceptions ourselves. It will be proper to pass upon the exceptions relating to the alleged error of the circuit judge in refusing to grant defendant's motion for a nonsuit. It must be borne in mind that the circuit judge overruled the demurrer to the complaint on the ground that the allegations of fact in such instrument failed to state facts sufficient for a cause of action. The appellant, by abandoning his first, second, third, and fourth grounds of appeal, has left the ruling of the circuit judge that

the demurrer was untenable. So that, to begin with, so far as this action is concerned, the plaintiff is admitted to have a good cause of action. But this leaves open the question, did the plaintiff by his testimony establish the cause of action as set out in his complaint? We agree with the circuit judge that the plaintiff has produced some testimony on the material allegations of his cause of action. As was very pertinently said by the late Chief Justice McIver, in a matter of nonsuit in an action against a railway company, to wit, in *Gillman v. Railway Company*, 53 S. C., at page 213, 31 S. E. 225: "There can be no doubt that when a railroad company receives a charter from this state, or even when it has been chartered by another state and allowed to exercise its corporate franchises within the limits of this state, it assumes certain duties to the public, accompanied with correlative rights of the public, which duties it is legally bound to perform on the one hand, and to recognize those rights on the other. When such a corporation assumes the position of a carrier of passengers within this state, as the defendant corporation is conceded to have done, it assumed, amongst other duties, the obligation to receive and carry safely and *promptly* [italics ours] all persons offering themselves for transportation to and from the various stations along the line of its road; and when the plaintiff offered himself as a passenger at Denmark, one of the defendant's stations, to be carried to Columbia, the termination of defendant's road, and thence to Richmond, Va., by connecting lines, he had a right to be received as a passenger and afforded every proper and necessary facility for reaching his destination comfortably, safely, and promptly, provided he complied with the reasonable regulations of the company for that purpose; and he also had a right to ask for and obtain from the officers and agents of the defendant company all necessary information to enable him to accomplish his purpose. If, therefore, the plaintiff was deprived of or hindered in obtaining the enjoyment of his legal right by the willful default of the agents or officers of the company intrusted with the performance of the duties resulting upon the company, or by the wanton or reckless disregard of the rights of the plaintiff, he certainly would have a cause of action against the company, not only to recover damages for any pecuniary loss he might thereby sustain, but also for exemplary damages, as a punishment for such willful and wanton disregard of the plaintiff's legal rights. Inasmuch as plaintiff is not suing for any consequential or special damages, the absence in the complaint of any such damages cannot affect the question; the claim being for exemplary damages, which arose immediately out of the alleged misconduct of the defendant's officers and agents." Again, in the case of *Young v. Telegraph Co.*, 65 S. C., at page 99, 43 S. E. 448, Mr. Justice Gary, as the organ of this court, points out very significantly the impropriety of granting a nonsuit in

cases analogous to this. The ticket agent at Spartanburg, with commendable politeness, informed the plaintiff that train No. 35 was 20 minutes late of the schedule time. And so it was. But when that train reached Spartanburg, at about 12:40, and the plaintiff got on board, along with a number of passengers, and after such train moved down the track towards Greenville, the train was stopped and stayed there until after 10 o'clock the next morning; a stop of nearly 10 hours. When the plaintiff applied to the conductor as to when the train would move on, no information of any worth was vouchsafed, so far as any information as to the cause of the delay or its duration was ever given to the passengers, and certainly to the plaintiff. What attention was paid to the duty of promptly delivering the passengers at their respective stopping points? None whatever. Great stress is attempted to be laid on the fact that next morning, after daylight, the plaintiff of his own motion walked down the track, and found that another engine and one car was off of the track. Now, in candor, what showing was thereby made to relieve the railroad company of its duty in the premises? It was not shown when this accident occurred, or that the railway company was not flagrantly remiss in riding its track of these impediments to travel. It was the railway's duty to have promptly removed these obstacles. It was done after 10 o'clock that morning. Are the traveling public to be treated in this way by a common carrier? From these considerations, together with the views expressed by the circuit judge on this point, we overrule these exceptions relating to the nonsuit.

2-4. We will next consider the exceptions relating to the alleged errors in the charge to the jury by the circuit judge, as set out in exceptions 11, 12, 13, 14, 15, 16, 17, and 18.

(15) The circuit judge could not charge the second request of defendant; for, if he had done so, he would have charged upon the force of the testimony, which is forbidden by the constitution of this state.

(16) The same objection exists as to this request to charge as pointed out in the expression of our views on the fifteenth exception.

(14) The fourteenth exception is overruled, referring, as it does, to another exception for its objection. We cannot uphold this practice.

(11) The charge as presented by the judge shows that he did not direct the jury to find damages for willful acts per se, but only when coupled with other matters. This exception is overruled.

(12) The judge does not decide that the failure of a railway company to run on its schedule time is an unlawful act, but only that it may be such. This exception is overruled.

(13) We think the judge properly charged as here pointed out, for it is the duty of the railway company to run its trains

Snow v. New York, etc., R. Co

on schedule time. It is a part of its contract with the public; and the onus is upon it to show why the dereliction of its duty occurred. This exception is overruled.

(17) We see no error here. It is the duty, under our Constitution, for circuit judges to declare the law to the jury in their charges. This is all that the circuit judge attempted to do. This exception is overruled.

(18) We see no error here. "Nominal damages" are what the words import, like the expression, "beyond a reasonable doubt." The defendant's attorney read from a highly respectable authority, but the circuit judge feared, if he adopted the language there cited, he might mislead the jury. Besides, he had already virtually in his own language charged the jury sufficiently on this point. This exception is overruled.

5. We will lastly examine the twenty-first exception. It needs few words from us to declare our inability to interfere here. The circuit judge was called on to grant a new trial on the minutes of the court. He would not do so, because he was satisfied the jury had followed the testimony in making up their verdict. We would agree with him in that conclusion, if it were our duty to do so, but under the law, so far as sufficiency of the testimony is concerned, the discretion is wisely vested in the circuit judge. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be, and it is hereby, affirmed.

JONES and WOODS, JJ., concur in the result.

SNOW v. NEW YORK, N. H. & H. R. CO. (two cases.)

(Supreme Judicial Court of Massachusetts, Suffolk, March 31, 1904.)

[70 N. E. Rep. 205.]

Injury to Passenger—Spells of Dizziness—Subsequent Fall.*

A passenger injured in a railroad collision, and suffering thereafter from attacks of dizziness, cannot recover for a broken wrist resulting from a fall occasioned by such an attack while she was standing in a sink to examine a leak in a water pipe.

Same—Damages—Making Claim—Evidence—Letters.

Letters by a claimant for damages from a railroad company for personal injuries, stating the claim and the amount demanded, are admissible in a subsequent action for the injuries, as bearing on the genuineness and extent thereof.

Exceptions from Superior Court, Suffolk County.

Actions by Eva F. Snow and by Theodore Snow against the New York, New Haven & Hartford Railroad Company.

*As to what does, and does not, constitute the proximate cause, see foot-note appended to *Haley v. St. Louis Transit Co.* (Mo.), 12 R. R. R. 142, 35 Am. & Eng. R. Cas., N. S., 142, where all the preceding authorities in this series are collected.

Verdicts for plaintiffs insufficient in amount, and they except. Exceptions overruled.

James E. Cotter and James F. McAnarney, for plaintiffs.
Choate & Hall, for defendant.

MORTON, J. These are two actions of tort, which are tried together. The first is for injuries received by the female plaintiff in a collision on the defendant's railroad on December 16, 1899, while a passenger; and the second is by the husband for expenses and loss of consortium. The liability was admitted, and the only question in each case was the amount of the damages. The verdicts were unsatisfactory to the plaintiffs, and the cases are here on their exceptions to certain rulings and instructions and to the admission of certain testimony.

There was testimony tending to show that, as the result of the injuries received, the female plaintiff became subject to attacks of dizziness, which continued at intervals from the time of her injury down to the time of the trial, which occurred in May, 1903, and there was testimony tending to show that on one occasion, when alone in her home several months before the trial, she got into a pantry sink by means of a chair, to see about a leak in the water pipe above the sink, and while standing in the sink had an attack of dizziness, and fell to the floor, and broke her wrist. She offered to show the pain and other inconveniences which she suffered from the broken wrist, but the court excluded the evidence, and instructed the jury not to consider the consequences of the broken wrist, as they were too remote, and the defendant was not responsible. The plaintiff excepted to these rulings and instructions, and this constitutes the first exception.

The case of *Raymond v. Haverhill*, 168 Mass. 382, 47 N. E. 101, would be decisive on this point except for the fact that it was a highway case. It was held in that case that the plaintiff, whose right ankle had been injured by a defect in a sidewalk in the defendant city, so that it became weak, and was liable at times to turn and fail to support her, could not recover for injuries received by her in consequence of a fall due to the failure of the ankle to support her as she was stepping from a chair to a settee while assisting in preparing for an entertainment in a public hall. It was held that the injuries so received were not the direct and immediate result of the injury received in consequence of the defect in the public way, but were due to a new and independent cause. It is true that cities and towns are not liable for consequential injuries resulting from defects in the public ways. *Nestor v. Fall River*, 183 Mass. 265, 67 N. E. 248. But there was a strong intimation in *Raymond v. Haverhill*, *supra*, that, if the action had been for negligence at common law, the later injuries could not have been considered as the

Chicago Union Traction Co. v. Olsen

natural and proximate result of the injury received in consequence of the defect in the sidewalk. And if in that case what took place was regarded as constituting a new and intervening cause—as it was—we do not see how what took place in the present case can be otherwise regarded. The breaking of the wrist certainly was not the direct result of the collision that caused, or may have caused, conditions which contributed to it, and but for whose existence it would not perhaps have happened. It cannot be justly said, however, it seems to us, that the collision was the proximate cause of the broken wrist, but that it was due to her getting up into the pantry sink to look at the leak in the water pipe, and was the result of voluntary and independent action on her part. The plaintiff relies, amongst other cases, on *Brown v. Chicago, etc., R. R.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41. But this court expressly declined to follow that case in *Raymond v. Haverhill*, supra. We think that this exception must be overruled.

The remaining exception relates to the admission of two communications sent by the plaintiff to the defendant. The plaintiff objected to their admission on the ground that they related to a compromise of the plaintiff's claim. The letters cannot be regarded as offers of compromise. They were a statement of the plaintiff's claim and of the amount which she demanded, and were admissible as bearing upon the genuineness and extent of her injuries. See *Snow v. Batchelder*, 8 Cush. 513; *Harrington v. Lincoln*, 4 Gray, 563, 64 Am. Dec. 95.

Exceptions overruled.

CHICAGO UNION TRACTION CO. *v.* OLSEN.

(Supreme Court of Illinois, Oct. 24, 1904.)

[71 N. E. Rep. 985.]

Harmless Error.

The error, in an order limiting the number of instructions to be requested or given, which does not deprive a party of any proper instruction, is not reversible error.

Injury to Passenger—Issues—Instructions.

Where, in an action against a street railway company for injuries sustained by a passenger while alighting from a car, the issues were whether the passenger was injured because of the sudden starting of the car or because of his contributory negligence, and the court instructed that the burden of proof was not on the company to show how the passenger fell, and, if it was not shown that he fell by reason of the negligence in starting the car, as charged in the declaration, he could not recover, and the court also correctly submitted the defense of contributory negligence, it was not error to refuse to charge that the negligence alleged was that the company suddenly started the car while the passenger was in the act of alighting, after the car had come to a stop.

Chicago Union Traction Co. v. Olsen

Same—Contributory Negligence—Getting on or Off Moving Car.*

Whether a passenger is guilty of contributory negligence in attempting to board or alight from a moving car is a question of fact for the jury, in view of all the circumstances.

Appeal from Appellate Court, First District.

Action by Louisa Olsen against the Chicago Union Traction Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

John A. Rose (W. W. Gurley, of counsel), for appellant.
Oscar M. Torrison and Hallie C. Ellis, for appellee.

BOGGS, J. The judgment entered in the superior court of Cook county in the sum of \$7,500 in favor of the appellee and against the appellant company in an action on the case brought by the appellee to recover damages arising from personal injuries received by her through, as she alleged, the negligence of the appellant company, was affirmed in Appellate Court for the First District on appeal, and the record is before us on the further appeal of the company. The errors relied on for reversal are (1) refusal of the trial court to consider and pass upon all the instructions requested by the defendant company; and (2) refusing the eighteenth, nineteenth, and twentieth instructions asked in the same behalf.

It appears that the trial court, during the hearing, on its own motion entered an order limiting the instructions to be asked by either party to 15 in number. In enforcing this order the court refused to receive or consider instructions numbered 14, 17, 18, 19, 20, and 21 tendered in behalf of the appellant company. It was error to arbitrarily restrict the number of instructions to be asked by the parties or given to the jury. *Chicago City Railway Co. v. Sandusky*, 198 Ill. 400, 64 N. E. 990. It is to be determined, however, whether the order adopted by the court operated to deprive the appellant company of any instruction which it was entitled to have given to the jury. If not so prejudicial, the error is not reversible in character. *Chicago City Railway Co. v. Sandusky*, supra. The complaint is that the said instructions numbered 18, 19, and 20 correctly stated the issues raised by the pleadings, and that such issues were not stated in any other of the instructions that were given.

The three instructions under consideration purported to recite or state the allegations, respectively, of the three counts of the declaration. Instruction No. 20 advised

*As to whether it is contributory negligence for passenger to board or alight from moving car, see foot-note appended to *Southern Ry. Co. in Miss. v. Williams* (Miss.), 12 R. R. R. 90, 35 Am. & Eng. R. Cas., N. S., 90 (boarding street car); foot-note appended to *Simmoms v. Seaboard Air Line Ry.* (Ga.), 11 R. R. R. 454, 34 Am. & Eng. R. Cas., N. S., 454 (alighting from moving cars or trains); foot-note appended to *Paganini v. North Jersey St. Ry. Co.* (N. J.), 11 R. R. R. 14, 34 Am. & Eng. R. Cas., N. S., 14 (alighting from moving street cars).

the jury that the first count in the declaration alleged that the appellee was a passenger on one of the trains operated by the appellant company; that the train came to a stop "to allow the plaintiff to alight, and while the plaintiff, with all due care and diligence, was then and there about to alight from said train, and before she had alighted, and before she had a reasonable opportunity to alight, the defendant negligently and carelessly caused such train to be suddenly started and moved, whereby the plaintiff was thrown down and injured, as alleged in said first count." Instruction No. 19 told the jury that the second count in the declaration charged that the train was caused to stop, and was negligently and carelessly suddenly put in motion while the appellee was attempting, with all due care and diligence, to alight, and she was thereby thrown upon the street and injured. Instruction No. 18 advised the jury as to the allegations of the third count, which were, in all material respects, the same as those of the second count. It will be observed that the negligence charged in each of the several counts of the declaration, as recited or stated in the instructions under consideration, is the same, namely, that the appellant company negligently and suddenly started the train.

Instruction No. 14 given at the request of the appellant company fully advised the jury as to the issue of negligence on which, under the declaration, the right of recovery was based. It read as follows: "The burden of proof is not upon the defendant to show how the plaintiff came to fall. If the preponderance of the evidence does not show that she fell by reason of the car being negligently and suddenly started and moved in manner, and form as charged in the declaration or some count thereof, then the plaintiff has failed to make out her case under the declaration in this case." The issue, so far as it related to the alleged negligence of the appellant company, was clearly and succinctly made known to the jury by this instruction.

Instructions Nos. 7, 8, and 9, which were given to the jury, stated the principles applicable to the defense that the appellee had failed to use ordinary care for her own safety.

Instruction No. 11 given at the request of the appellant company was more favorable to the cause of the appellant company than the law warranted. It erroneously charged the jury that if they believed, from the evidence, that "the plaintiff attempted to alight from the car in question before the same came to a stop, and while the same was in motion, then the court instructs the jury that the plaintiff cannot recover in this action." Whether a passenger is guilty of contributory negligence in attempting to board or alight from a moving car or train is a question of fact for the jury to determine in view of all the attending and surrounding circumstances, and not a question of law for the decision of the court. *Chicago & Alton Railroad Co. v. Byrum*, 153 Ill.

Wheeler v. South Orange & M. Traction Co

131, 38 N. E. 578; 3 Thompson on Negligence, §§ 3015, 3565. The issues were whether the plaintiff, while exercising due care and diligence, was alighting from the car after it had come to a stop, and was thrown off by the negligence of the defendant in suddenly starting the car before she had time to alight, or whether she attempted to get off the car while it was in motion, before it had come to a stop, and was guilty of a lack of ordinary care in so doing. These issues were clearly and comprehensively stated to the jury in the instructions, and the appellant company was in no wise prejudiced by the ruling and action of the court in the matter of instructing the jury.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

WHEELER v. SOUTH ORANGE & M. TRACTION CO.

(Court of Errors and Appeals of New Jersey, July 8, 1904.)

[58 Atl. Rep. 927.]

Carriers—Injury to Passenger—Questions for Jury.*

Upon the trial of an action by a passenger to recover for injuries sustained by contact with a trolley pole while walking upon the running board of a moving car, the evidence tended to show the following facts: The trolley poles stood between the tracks at intervals of 125 feet, and were distant from the outside of the car, when passing, 1 foot and 8 inches. Ordinarily the side next to the poles was closed by a movable bar and wire grating, so that the entrance and exit of passengers would be away from the poles. For several weeks, a bridge being out of order, the car was switched to the opposite track, and ran some distance without a change of the bar and grating. The plaintiff was a frequent traveler upon the car, and was more or less familiar with the situation. On the occasion in question he had stepped upon the rear platform, and, the seat being occupied, stood against the dashboard. The conductor had passed along the running board, collecting fares, in safety, while the car was moving, and when collecting plaintiff's fare invited him to "go in the car and sit down." As it approached an intersecting street the car slowed down, and had stopped, or almost stopped, when plaintiff stepped down upon the running board and was about to take a seat inside, when by a sudden forward movement of the car he lost his balance, collided with one of the poles, and fell. Motions to nonsuit and direct a verdict on the grounds of contributory negligence and obvious risk were refused. Upon review it was held that the questions were for the jury, and that there was no error in the ruling.

(Syllabus by the Court.)

Error to Circuit Court, Essex County.

Action by Horace P. Wheeler against the South Orange &

*As to whether it is contributory negligence for a passenger to stand on the running board of a moving street car, see *Anderson v. City & Suburban Ry. Co. (Ore.)*, 6 R. R. R. 763, 29 Am. & Eng. R. Cas., N. S., 763; *Moody v. Springfield St. R. Co. (Mass.)*, 6 R. R. R. 116, 29 Am. & Eng. R. Cas., N. S., 116 (riding on running board when there are seats vacant); *Bainbridge v. Union Traction Co. (Pa.)*, 8 R. R. R. 774, 31 Am. & Eng. R. Cas., N. S., 774 (standing on running board of open electric car, and thrown off by sudden jerk); *Hassen v. Nassau Elec. R. Co. (N. Y.)*, 12 Am. & Eng. R. Cas., N. S., 1.

Wheeler v. South Orange & M. Traction Co

Maplewood Traction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William Reed Howe and Gilbert Collins, for plaintiff in error.

Simon J. Klauber and Nathan C. Horner, for defendant in error.

HENDRICKSON, J. A reversal of the judgment is sought in this case on two grounds: (1) For refusal of the trial court to nonsuit and to direct a verdict; (2) for a refusal to charge as requested. This action arose out of the plaintiff's injury while a passenger upon a trolley car. The evidence on the part of the plaintiff tended to show that he was in the act of passing from the rear platform of an open car, on which he was riding, to the rear seat of the car; that in doing so he had stepped upon the running board, and before he could enter a sudden movement of the car forward caused him to lose his balance, and while attempting to regain it he was struck by contact with a trolley pole standing between the double tracks of the company, and thrown upon the ground, receiving the injuries complained of. This refusal to withdraw the case from the jury, it is urged, was erroneous, because it is alleged that the plaintiff himself was negligent, and that his conduct was such that he assumed the risk.

To sustain this proposition it must be shown that the negligence of the plaintiff so clearly appears that it was a question for the court and not for the jury. The evidence was uncontradicted that the railway in question was operated by electricity, the wires being strung upon poles erected between the two tracks, and standing about 125 feet apart; that the cars were usually so operated that the entry and exit of passengers would be upon the side of the car away from the poles, the other side next to the poles being closed by the dropping of the bar and grating; that the plaintiff, who was a carpenter, had been working at South Orange, and about 6:30 o'clock in the evening entered the car at South Orange avenue to go home to West Orange; that the car was going north, and in doing so ordinarily would take the easterly track, but, a bridge being up and under repairs, the car took the south-bound or westerly track for part of the distance, as it had been doing for several weeks; that this was done without any change being made in the position of the bar and grating upon either side, so that upon that part of the trip the side of the car open for the entry and exit of passengers was toward the trolley poles; that the car stopped a few seconds at the avenue named, to allow plaintiff and his brother to enter the car, which they did from the side next to the poles, the plaintiff stepping upon the rear platform and the brother taking the second seat in the car from the rear; that the plaintiff, after the car started, remained stand-

ing on the platform, against the dashboard, facing in the direction the car was going, until the car had gone a distance of about one-quarter of a mile and was nearing Meade street; that the distance between the side of the car and the poles was one foot and eight inches, and the distance between the outer edge of the running board and the poles was one foot. From this point in the testimony there was some conflict in the evidence; but in reviewing a refusal to nonsuit, or to direct a verdict, the evidence must be regarded that is the more favorable to the plaintiff, for the court cannot consider upon error the weight of the testimony. *Traction Co. v. Thalheimer*, 59 N. J. Law, 474, 37 Atl. 132. We may also look at the testimony taken in the cause after the refusal to nonsuit, to see whether the latter evidence would cure any possible defect in the plaintiff's evidence when he rested.

There was further evidence tending to show that there was a seat on the rear platform, facing backward, which was occupied by men sitting there and with dinner pails; that the plaintiff for that reason remained standing until the car approached Meade street; that the conductor had passed from the front to the rear of the car, along the running board, while the car was moving, and had taken the fares from the passengers upon the rear platform, saying to the plaintiff at the time, "Go in the car and sit down;" that as the car slowed up and was almost stopped at Meade street, as the plaintiff said, or had stopped, as the brother and others testified, the plaintiff, taking hold of a bar at the rear of the end seat with his left hand, stepped with his left foot on the running board, and was about to step into a seat, when the car started with a sudden jerk, whereby he lost his balance and was struck with a dark object ahead, which he supposed must have been a pole; that he would have had room enough on the running board, if the car had not thrown him out, so that he could not pull himself in time. It also appeared in the case that the plaintiff had been traveling over this line every day for several weeks with the car open, as this was for part of the journey, on the side next to the poles.

The defendant contends that the plaintiff, in doing what he did, was acting with full knowledge of the danger, and therefore assumed an obvious risk, which should bar a recovery. The case of *Flynn v. Consolidated Traction Co.*, 67 N. J. Law, 546, 52 Atl. 369, is cited as giving support to the proposition thus suggested. In that case the passenger was upon the running board, looking back and leaning outwards, so as to see the conductor and signal him to stop the car; it having been run by the usual place for alighting. A nonsuit by the court below was there sustained, not upon the ground of negligence imputed as the result of assuming an obvious risk, but on the ground that he was clearly guilty of contributory negligence in failing to observe the passing

Wheeler v. South Orange & M. Traction Co

vehicle that struck him, which, if he had used observation, he must have seen and could have avoided. While the proposition contended for would doubtless be sustained where a plaintiff had thus exposed himself to a danger that was imminent, and was known by the plaintiff to be such at the time, yet the present case does not present the features here suggested. The use of the running board in that way did not appear to be absolutely hazardous. There was a space of one foot and eight inches between the car and the poles, and the case shows that the conductor used the running board in safety while collecting fares. The plaintiff had seen this. It may fairly be inferred from the evidence that the plaintiff would have passed to a seat in the car with safety, but for the sudden jerk, whereby he says he lost his balance. Nor does it clearly appear that the plaintiff had full knowledge of the danger. He may have observed the proximity of the poles in a general way as he rode upon the cars, but that he appreciated the fact that the proximity was such as might be dangerous to persons standing or walking upon the running board is not so clear.

Another factor to be observed upon the question of the plaintiff's negligence is that he was invited by the conductor to take a seat in the car. He was therefore in the exercise of a right that belonged to him as a passenger, when he attempted to go upon the running board to find a seat in the car. Such acts are not ordinarily regarded as negligent *per se*. *Scott v. Bergen Co. Traction Co.*, 63 N. J. Law, 407, 43 Atl. 1060; *Traction Co. v. Gardner*, 60 N. J. Law, 571, 38 Atl. 669; *Paganini v. North Jersey St. Rwy. Co.* (N. J. Sup.) 57 Atl. 128. Another circumstance developed by the evidence is that the plaintiff waited before seeking a seat in this way until the car had slowed up on its approach to Meade street, where it was accustomed to stop, and had almost, if it had not actually, stopped when he started to do so. We think, under the circumstances here outlined, the question of contributory negligence was at least debatable, and hence proper to be submitted to the jury.

In the case of *Coleman v. Second Avenue Railroad Co.* (decided in the New York Court of Appeals) 114 N. Y. 609, 21 N. E. 1064, which was cited by defendant's counsel upon another point, support may be found for the view here expressed. The facts were very similar; the principal difference being that the passenger, in going along the running board to seek a seat, was injured by his head striking against one of the columns supporting the elevated railroad above. After stating in the opinion that if, without reasonable cause, the passengers upon the street railway leave the car or place themselves on the outside of it when in motion, they assume the hazards of so doing, the learned judge proceeds to say: "This cause, which may justify a passenger, without the imputation of fault on his part as against the

carrier, in leaving his seat and going outside the car, and occupying, temporarily or otherwise, a position there while it is in motion, must be dependent upon the occasion and the circumstances which induce or impel him to do so." He also said in the opinion: "Whether the plaintiff was justified in leaving his seat and going outside the car to seek another seat in it, was a question of fact for the jury." We think there was no error in the refusal to take the case from the jury.

Was there error in the court's refusal to charge as requested? The following were the questions to charge: (1) It was not negligence on the part of defendant to run cars on left of poles, if plaintiff was familiar with the fact. (2) It was not negligence on the part of defendant to have the run board down. (3) It was negligence on part of plaintiff to step on runboard when car was in motion, he not being about to alight, unless with the knowledge of conductor. (4) It was negligence for passenger to leave position of safety and put himself in peril without advising the conductor. (5) Plaintiff, having knowledge of existence of peculiar danger, was chargeable with special care and caution. These requests were denied, except as already charged. We think the subject-matter of these requests was fairly covered by the charge as presented. It must be observed that in all the requests, except the last, the trial judge was requested to charge as to whether certain specific acts proven, standing alone, would or would not constitute negligence. It is a settled rule that reasonable care and its lack, or negligence, must in the main depend upon the facts of each particular case. 21 Am. & Eng. Ency. of Law, 465; Central R. R. Co. v. Moore, 24 N. J. Law, 824. The trial judge very properly presented in his charge, as the gist of the action, the several breaches of duty relied upon for a recovery, to wit, the failure to provide safe and proper entrances and exits from the car, to furnish guards and other proper appliances, and the careless operation of the car under the circumstances, and left it to the jury to say whether, under all the circumstances, the defendant was negligent. It is apparent that the quality of such acts, whether negligent or not, would often depend upon other acts and conditions in the group to be considered. It would therefore be improper to ask the court to characterize as negligent, or not, particular acts apart from the others, from the whole of which it became the duty of the jury to say whether the defendant was negligent.

With reference to the question of the defendant's negligence the judge said, among other things: "Now, you may consider all the circumstances—the location of the pole with reference to the line of the car—the arrangement of the car. * * * Was there a lurch, either of a violent character or of a usual character? It has been held that a lurch of an unusual

St. Louis Southwestern Ry. Co. v. Birdwell

or violent character, such as cannot be reasonably anticipated by a passenger, is of itself evidence of negligence. * * * Now, taking all these facts together, what do you think the weight of the evidence is as to the question whether the defendant was negligent? Did the company exercise a high degree of care to protect this passenger from injury? If it did, it performed its whole duty, and your verdict should be for the defendant. If it did not do its duty in this respect, and the accident resulted from its breach of duty, then your verdict should be for the plaintiff, unless he himself contributed by his negligence to his own injury."

Upon the question of contributory negligence the trial judge said, among other things: "Was the risk of colliding with the pole a danger obvious, or that should have been obvious, to the plaintiff? Was it a danger that he knew of, or should have known of, as a man of ordinary, reasonable prudence (and that is all that was required of him), and which he recklessly incurred? Did he take the risk? If he did, he cannot recover." He may say with regard to the last question that, while it is true that a higher degree of care may be required in the face of an obvious danger, still the recognized doctrine is that, whatever may be the relation of the parties or the likelihood of danger, reasonable care in the light of the circumstances is all that is required. 21 Am. & Eng. Ency. of Law (2d Ed.) 495.

The trial judge called the jury's particular attention to the features of danger that attended upon the plaintiff's attempt to enter the car, and instructed them, if the plaintiff was negligent under the circumstances and his negligence contributed to the accident which caused his injury, he could not recover. This we think amounts to a substantial compliance with the request, and that there was no error in refusing to charge otherwise than had already been charged.

The result is that the judgment below will be affirmed, with costs.

ST. LOUIS SOUTHWESTERN RY. CO. v. BIRDWELL.

(Supreme Court of Arkansas, Oct. 15, 1904.)

[82 S. W. Rep. 835.]

Connecting Carriers—Loss of Goods—Burden of Proof.*

Where the last carrier is sued for the loss of part of the goods shipped over connecting lines, and it is admitted they were delivered to the initial carrier, defendant has the burden of proof that they were not lost on its line.

Appeal from Circuit Court, Greene County; Felix G. Taylor, Judge.

*As to the burden of proving which carrier was guilty of the negligence causing loss of or injury to goods transported over several connecting lines, see foot-note appended to *Beede v. Wisconsin Cent. Ry. Co.* (Minn.), 9 R. R. R. 290, 32 Am. & Eng. R. Cas., N. S., 290, where all the preceding authorities in this series are collected.

St. Louis Southwestern Ry. Co. v. Birdwell

Action by V. S. Birdwell against the St. Louis Southwestern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

In January, 1901, V. S. Birdwell delivered to the St. Louis Southwestern Railway Company of Texas, at Bassett's Station, on its line, four boxes of household goods and a barrel of molasses for shipment to Marmaduke, Ark., a station on the line of the defendant. He received from the company a through bill of lading for the shipment of the goods, which were consigned to himself. The defendant duly delivered the goods at Marmaduke, with the exception of one box, which was missing, and was not delivered. But, though one of the boxes had been lost, the agent of the defendant at Marmaduke presented a bill for the freight on all the goods, including the part that was lost, and plaintiff paid the same. He afterwards brought suit against the company for the value of the box of goods that was lost. On the trial there was a verdict and judgment for \$61.40 the value of the lost goods and a small amount of overcharge in freight, which the defendant admitted. The defendant appealed.

Sam H. West and J. C. Hawthorne, for appellant.
Johnson & Huddleston, for appellee.

RIDDICK, J. (after stating the facts). This is an action against the delivering carrier to recover for goods lost in transit. There was evidence introduced by the defendant company showing that its line only extended to Texarkana, and that the St. Louis Southwestern Railway Company of Texas, which received the goods, was a different corporation, though, judging from the map of the two lines appearing on the back of the bill of lading issued to the defendant by the Texas company advertising the two lines under the joint name of the "cotton Belt Route," it would appear that these two lines, though owned by different corporations, are closely connected in their business management and operation. But, as they are separate corporations, the defendant company contends that there was no evidence that it received the lost box of goods, and that for that reason there is no evidence to sustain the verdict. But in the case of the injury or loss of goods shipped over connecting lines, if the last carrier is sued, the burden of proof will be on it to show that the injury did not occur on its line. The reason for this rule is that the carrier is in a much better position to prove the condition of the goods at the time it received them than the owner of the goods. We see no reason why that rule should not apply in this case. How could the shipper know whether all of his goods were delivered to the defendant by the initial carrier? To make that proof would probably have put him to great inconvenience and trouble, but the defendant or its employees certainly knew,

Dagnall v. Southern Ry. Co

or should have known, whether it received the goods or not, and the fact that it offered no proof on that point raises the prima face presumption that it did receive the goods. It is admitted that the goods were delivered to the initial carrier, and there is nothing to rebut the presumption that they were received by the defendant connecting carrier and lost by it. *Faison v. Alabama & V. Ry. Co.*, 69 Miss. 569, 13 South. 37, 30 Am. St. Rep. 577; *Cooper v. Georgia Pac. Ry. Co.*, 92 Ala. 329, 9 South. 159, 25 Am. St. Rep. 59.

As the judgment was clearly right, we need not consider the instructions, as no prejudice resulted.

Affirmed.

DAGNALL *v.* SOUTHERN RY. CO.

(Supreme Court of South Carolina, April 29, 1904.)

[48 S. E. Rep. 97.]

Ejection of Passenger—Ticket—Conditions—Evidence.

In an action for the expulsion of plaintiff from defendant's train, question by defendant's counsel of plaintiff, whether he knew the printed condition on the ticket and the construction of the contract between himself and the railroad company, was properly excluded.

Same—Same—Same—Notice.*

Where a passenger purchases a ticket, without having his attention called to limitations thereon, he has a right to ride on the ticket for which he has paid full fare at any time.

Same—Punitive Damages.†

Where the expulsion of a passenger was wanton and willful on the part of defendant's employees, plaintiff is entitled to recover punitive damages.

Appeal from Common Pleas Circuit Court of Greenville County; Aldrich, Judge.

Action by A. H. Dagnall against the Southern Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

T. P. Cothran, for appellant.

Tribble & Prince and McCullough & McSwain, for respondent.

JONES, J. This is an action for damages for alleged un-

*See foot-note appended to *Brown v. Rapid Ry. Co.* (Mich.), 9 R. R. 802, 32 Am. & Eng. R. Cas., N. S., 802 (whether ticket conclusive evidence to conductor as to passenger's rights).

Foot-note appended to *Norman v. Southern Ry. Co.* (S. Car.), 8 R. R. 307, 31 Am. & Eng. R. Cas., N. S., 307; *Saunders v. Southern Ry. Co.* (C. C. A.), 11 R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596 (whether acceptance of ticket includes assent to its printed conditions).

†As to the right to recover punitive or exemplary damages for injuries to passengers, see foot-note appended to *McNamara v. St. Louis Transit Co.* (Mo.), 12 R. R. 832, 35 Am. & Eng. R. Cas., N. S., 832; foot-note appended to *Chiles v. Southern Ry.* (S. Car.), 12 R. R. 750, 35 Am. & Eng. R. Cas., N. S., 750.

Dagnall v. Southern Ry. Co

lawful and willful expulsion of plaintiff from defendant's passenger train, and resulted in a judgment in favor of plaintiff for \$1,200. On September 12, 1901, plaintiff bought a regular straight ticket for passage on defendant's train from Easley to Seneca, for which he paid full fare. For some reason he did not use the ticket until April 13, 1903, when he presented it to the conductor for passage from Easley to Seneca. The conductor declined to receive it, claiming that it was out of date, and, on plaintiff refusing to pay the fare, he was expelled from the train at Liberty, S. C., a station between Easley and Seneca. The ticket, in addition to other conditions, contained the following printed in full on its face: "Good for one passage if used on or before midnight of date canceled by 'L' punch in the margin below only on trains stopping at destination." The date so punched was September 12, 1901.

1. Appellant's first exception relates to the admissibility of certain testimony. When plaintiff was being cross-examined by defendant's counsel, he was asked "if he knew the printed condition of the ticket that is in evidence here, and if he knew the construction of the contract between himself and the railroad company." Plaintiff's counsel made objection that it would be irrelevant to show witness' construction of the contract. While the case shows that objection was sustained, it also shows that the court's express ruling was that it would be competent to ask witness if he agreed to the contract. The error assigned is that plaintiff would certainly have been bound by the condition as to time, if he had actual notice thereof and assented thereto, and that his knowledge of the condition and of the construction of the contract, and his accepting the ticket with such knowledge, without objection, was relevant testimony upon the issue whether he had actual notice of the condition and assented to it. There would be force in the exception but for these considerations: First, the court by its express ruling advised defendant's counsel that he could interrogate the witness as to whether he agreed to the conditions named in the ticket. In the second place, no harm arose to appellant by the ruling, for, immediately after the ruling, the following questions and answers were made, substantially covering the point: "How many times have you traveled on tickets like that? Very few times. I can give you my reason. I have been living on a road where they give you a pasteboard ticket good for all times. When you saw this one, you knew it was different from the other tickets? I didn't know what kind of a ticket he was giving me. You knew the one he gave you was a different kind of a ticket? I know now that it was a different kind. At that time I didn't know any difference as to the limitation. I didn't look at it." Furthermore, the witness, at folio 15, testified that at the time of the purchase of the ticket the agent of defendant

Dagnall v. Southern Ry. Co

company did not call his attention to any limitation on the ticket, that witness did not read the ticket, and did not know what kind of a ticket it was. He also testified to the same effect at folio 60.

2. The court charged the jury: "The law is that if a man pays his fare to be transported upon the railroad company's cars from one point to another, and pays it in accordance with the provisions of the law that exists in this state, it is the duty of the common carrier to transport him under the contract. The ticket here, although it is unsigned by any one, except it is stamped on the back, is an evidence of the contract permitting him to be carried. And the law is, if a man buys a ticket on a railroad train and pays full fare for it, under the provision of the law, he is not bound to ride on that ticket that day. He may keep his ticket and ride on it another day. You notice the distinction of what we call a first-class ticket. It is one for which he pays the regular rate. The law is, on an excursion train or a special train, and where the fare is reduced, and a person buys a ticket and he agrees to use it upon a certain train, that would not be admissible, nor permissible, because that is the contract between the parties; but, where he buys a ticket on a regular train, he is entitled to ride upon that at any time he sees fit to present his ticket to ride upon, unless he agrees to or signs the contract limiting it to a certain day. Now, this paper which I hold in my hand is an unsigned ticket, and if the plaintiff paid full fare for that, as alleged, and was upon the train expecting to ride upon that, he had a right to do so." In this connection, the court charge defendant's eleventh request to charge, as follows: "If a passenger knows of the regulations of the railroad company limiting the time within which his ticket is to be used and accepted, he is bound thereby." The specifications of error assigned to the charge first above quoted are: "(a) A common carrier has the right to adopt and enforce reasonable regulations for the conduct of its business. The condition that a ticket can be used only upon the day of the purchase and date is a reasonable regulation, by which the passenger is bound, whether he has actual notice thereof at the time of the purchase or not, and whether he has assented thereto or not. (b) Even if the plaintiff had no notice of the condition and was not bound thereby at the time of purchase, it should have been left to the jury to say whether he had not waived his right and acquiesced in said condition by retaining the same for 18 months, and presenting it after he knew of the condition and after he knew that he could have redeemed the ticket not used. (c) It should have been left to the jury to say whether the plaintiff had not purposely made the trip and procured his own ejectment for the purpose of a lawsuit, and, if so, he could not maintain the action."

The recent case of *Norman v. Southern Railway*, 65 S. C.

Dagnall v. Southern Ry. Co

517, 44 S. E. 83, 95 Am. St. Rep. 809, holds that a passenger paying full fare for a general ticket is not bound by limitations printed thereon, unless his attention has been called to them and he has assented thereto. The charge was in conformity with the law declared in that case. Appellant has requested that the decision in that case be reviewed. After careful consideration, we adhere to the rule therein announced. With reference to specification "b," we need only say that whether the plaintiff is bound by the time limitation on the ticket must depend upon whether he knew of the condition and assented to it at the time of its purchase. With reference to specification "c," we may say that it does not seem to have relevancy to the rule of law which the court was declaring to the jury. If there was anything in the testimony warranting instruction as to plaintiff's right to maintain the action, because of his conduct or motive in procuring his ejection, a proper request to charge should have been submitted on that contention.

3. The sixth exception imputes error in refusing to charge the jury as follows: "A railroad company is not responsible in punitive damages for the willful or wanton act of one of its servants. To hold otherwise would deprive the railway company of its property without due process of law, in violation of the United States Constitution, 14th amendment." This court has so frequently held that a railroad company is responsible in punitive damages for the willful or wanton acts of its servants, resulting in injury to all passengers, that it is useless to cite authorities.

4. The remaining exception, not disposed of by what has been already ruled, is the seventh, which alleges error in the following charge: "If the jury believe that the defendant willfully, wantonly, or recklessly ejected plaintiff from its train on the occasion alleged in the complaint, then plaintiff is entitled to recover vindictive or punitive damages in such sum as would, in the opinion of the jury, punish the defendant for its willful, wanton, or reckless conduct." The error assigned is that it is solely a matter within the discretion of the jury whether punitive damages shall be allowed, and is not a matter of right in the plaintiff. The jury has a discretion in fixing the amount which shall be awarded by way of exemplary damages, but it is not within their discretion to refuse to award any exemplary damages when a case is made which in law justifies such damages. The plaintiff's right to recover exemplary damages follows when he has alleged a cause of action warranting such damages, has offered evidence in support thereof, and there is no defense defeating his cause of action. Thereupon a duty devolves upon the jury to render a verdict in accordance with plaintiff's right. "Exemplary or punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded; and, indeed,

Louisville, etc., Ry. Co. v. Covetts

it may be said that such damages in a measure compensate or satisfy for the willfulness with which the private right was invaded, but in addition thereto operates as a deterring punishment to the wrongdoer, and as a warning to others." *Watts v. Railroad Company*, 60 S. C. 73, 38 S. E. 240; *Brasington v. Railroad Company*, 62 S. C. 331, 40 S. E. 665, 89 Am. St. Rep. 905. In *Griffin v. Southern Railway*, 65 S. C. 127, 43 S. E. 447, the court, speaking by Mr. Justice Gary, said: "The plaintiff is as much entitled to the damages arising from an act of intentional wrong as those growing out of negligence."

The judgment of the circuit court is affirmed.

LOUISVILLE, H. & ST. L. RY. CO. v. COVETTS.

(Court of Appeals of Kentucky, Nov. 15, 1904.)

[82 S. W. Rep. 975.]

Carriers—Injuries to Passengers—Stations—Misdirection—Damages—Excessiveness.*

Plaintiff, a woman under 21 years of age, and a young man friend took passage on defendant's train, and by the negligence of defendant's employees were put off at a station in the woods, at about 10 p. m., five miles before their destination was reached. There was no depot at the place, or any place where they could remain all night, and they were compelled to walk down the railroad track, most of the way through woods, cuts, and over long trestles, to their destination, where they arrived at about daybreak. Plaintiff testified that she was very much mortified, frightened, and fatigued: *held*, that a judgment allowing plaintiff \$500 was not so excessive as to indicate passion and prejudice on the part of the jury.

Appeal from Circuit Court, Daviess County.

"Not to be officially reported."

Action by Jennie Covetts against the Louisville, Henderson & St. Louis Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Helm, Bruce & Helm, for appellant.

Sweeney, Ellis & Sweeney, for appellee.

NUNN, J. Appellee, Jennie Covetts, who was an infant under 21 years of age, brought this suit by her brother, as next friend, to recover damages from appellant for having wrongfully and without right put her off at a station in the nighttime before she arrived at her destination, and on the trial recovered a judgment for \$500, from which appellant has appealed.

There is no serious objection to the action of the lower

*See foot-note appended to *Schmidt v. Cleveland, C. C. & St. L. Ry. Co. (Ky.)*, 12 R. R. R. 149, 35 Am. & Eng. R. Cas., N. S., 149, where all the preceding authorities in this series are collected.

New Orleans Terminal Co. v. Teller

court in its admission or rejection of evidence nor to its instruction to the jury. It is contended that the verdict was excessive to such an extent as to show passion or prejudice in the minds of the jurors. This makes it necessary for us to give a short statement of the facts as shown by the proof. It appears that on the 28th of September, 1902, the appellee purchased a ticket from appellant, whereby it agreed to carry her from the city of Louisville to Powers Station, in Daviess county, Ky. She took passage on appellant's train at Louisville about 10 p. m. o'clock on that day. She was accompanied by a young man friend of hers. When they arrived at Waitman, a station upon appellant's line of road about five miles before they reached Powers Station, the servants in charge of the train announced that they had arrived at Powers Station, and she, with her friend, assisted by the brakeman in carrying off her bundles, alighted from the train. The train immediately moved on, when they discovered that they were not at Powers Station. Her proof showed that this station, Waitman, was a small station in the woods, without a depot, and that there was no place where they could remain all night. Appellant's proof contradicted this. The proof showed that she did not know any one living at Waitman, nor did she or her friend know anything about the roadway leading from Waitman to Powers Station, and consequently they were compelled to walk down the railroad track. The night was very dark, most of the way through the woods, cuts, and over long trestles to Powers Station, where they arrived about daybreak. She stated that she was very much mortified, frightened, and fatigued. If her evidence was true, which the jury evidently believed, those in charge of appellant's train were very careless and negligent with reference to the rights and interests of the appellee, and caused her considerable annoyance, discomfort, and mental suffering and anxiety; and while we are of the opinion that the verdict is rather large for the injury received, yet we cannot say that it is so excessive as to indicate passion or prejudice in the minds of the jury. Wherefore the judgment of the lower court is affirmed.

NEW ORLEANS TERMINAL CO. v. TELLER.

(Supreme Court of Louisiana, Dec. 5, 1904.)

[37 So. Rep. 624.]

Appeal—Exceptions to the Merits.

The court again animadverts upon the deplorable practice of referring to the merits exceptions that do not involve the merits.

Same—Same.

Especially should not such exceptions be referred to the jury of freeholders, whose jurisdiction is special, and extends to those questions alone which the law directs shall be submitted to it.

Harmless Error.

Not every error will furnish sufficient ground for setting aside a judgment and ordering another trial. There must be prejudice to the appellant, and the prejudice must be such as cannot be remedied on the appeal.

Corporations—Actions.

A corporation can sue in its own name, without any necessity of designating its president or any of its other officers in the petition.

Expropriation—Eminent Domain—Public Use.*

Private property can be expropriated under the eminent domain power only for a public purpose. Hence the defendant in an expropriation suit may always raise the question of whether the purpose for which his property is sought to be expropriated is public in its nature. Whatever may be the reason why the purpose is not public, it may be shown.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans;
Thomas C. W. Ellis, Judge.

Action by New Orleans Terminal Company against Alvine Teller. Judgment for plaintiff, and defendant appeals. Reversed.

Saunders & Gurley, for appellant.

Farrar, Jonas & Kruttschnitt, for appellee.

PROVOSTY, J. The plaintiff, alleging itself to be a railroad corporation duly incorporated under the laws of this state, has brought this suit to expropriate a square of ground in the city of New Orleans belonging to the defendant.

Defendant excepted to the petition on the two grounds: First, that the purposes for which the property is sought to be expropriated are not stated in the petition; and, second, that the suit is not brought or authorized in the manner required by law.

Over the objection of the defendant, the court referred the exception to the merits; that is to say, to the decision of the jury of freeholders.

In so doing the court erred. Obviously the question of the sufficiency of the petition was one properly to be decided before defendant should be required to answer to the merits. In the next place, the questions raised were "incidental questions arising in the course of the trial," such as are to be "decided summarily, without the intervention of a jury." Code Prac. arts. 755, 757; *McGehee v. Brown*, 3 La. Ann. 272; *Goodloe v. Holmes*, 2 La. Ann. 400. And moreover the jury of freeholders in an expropriation suit is not an ordinary jury, or, in other words, a tribunal or court of general jurisdiction, but is a tribunal or court of special jurisdiction, qualified to pass on those questions alone, which the law has prescribed shall be submitted to it. With matters pertaining

*As to what constitutes a public use for which private property may be condemned, see foot-note appended to *Healy Lumber Co. v. Morris* (Wash.), 12 R. R. 171, 35 Am. & Eng. R. Cas., N. S., 171.

to the sufficiency of the pleadings for bringing the case before the court, such a tribunal can have nothing to do.

The defendant had the legal right to have the exceptions disposed of as exceptions, and of this legal right she has been deprived by the unwarranted action of the lower court. This court has again and again animadverted upon the deplorable practice of referring to the merits exceptions that do not involve the merits.

The worst of it is that by the time a case reaches this court the evil of this practice has been wrought and is beyond remedy, and this court is made to countenance a thing it deprecates and condemns—a halfway denial of a litigant's full measure of justice. In the present case, for example, the error is found not sufficiently prejudicial to the appellant to justify the setting aside of the judgment and ordering of another trial, and yet the appellant certainly had the legal right to have the exceptions passed on as exceptions, and has been deprived of that right.

The deficiency of the petition was caused by the failure to file certain maps annexed to and made part of it, for the purpose of showing to what use the land was intended to be put. Counsel say the failure to file these maps was due to an oversight on the part of a clerk in their office. The petition alleged that the land was needed for railroad purposes, but did not describe or specify the purposes, otherwise than by a reference to the maps. The maps were, however, produced and filed on the trial, and they showed that the land was sought to be taken for the laying of storage and classification tracks. As thus supplemented, the petition was full and complete, and as a result the exception was fully met.

Had the maps not been filed at all, or had the defendant, when they were filed, asked to amend her answer, or for further time in which to prepare her defense, and the court had refused, or even had the defendant objected to the filing of the maps, and stood upon her right to have a legally sufficient petition served upon her before she should be required to answer, the exception would most unquestionably have had to be now sustained and the case sent back for another trial. But the defendant permitted the maps to go in without objection, did not plead surprise, did not ask for further time, but went on and tried the case as if the petition had been sufficient from the beginning and the exception had never been made; and this court is satisfied that the case as presented by the record is precisely the same as it would have been if the petition had been perfect. Under these circumstances, it would serve no useful purpose to now sustain the exception and remand the case for another trial.

Not every error will furnish sufficient ground for setting aside a judgment and requiring a case to be tried over again. There must be prejudice to the appellant, and the prejudice must be such as cannot be remedied on the appeal, but only

by another trial. *Ealer v. Freret*, 11 La. Ann. 455; *Bush v. Decuir*, 11 La. Ann. 503; *Smith v. McWaters*, 7 La. Ann. 146; *Howell v. St. Charles St. R. Co.*, 22 La. Ann. 604; *Levi v. Weil & Bro.*, 24 La. Ann. 223; *State v. R. Co.*, 34 La. Ann. 951; 3 Cyc. 387.

The second exception was founded on the fact that neither the name of the president nor of any other officer of plaintiff corporation was stated in the petition, but only that of the corporation was stated.

The court sees no reason why such an appearance by a corporation should not be entirely sufficient. A corporation is a person, and does not labor under any incapacity, like a minor or an interdict. What good reason could there be, then, why it should not sue in its own name alone? True, it can act only through agents, it being a mere judicial person; but, inasmuch as it has the capacity to stand in judgment for itself, what necessity is there for naming these agents in the petition?

The law governing the matter is article 112 of the Code of Practice, which reads as follows:

"Corporations, bodies corporate and chartered institutions act judicially through their proper representatives under the name or title given to them in the act of incorporation."

Grammatically this text is susceptible of the reading that corporations act judicially through their proper representatives under the name or title given to these representatives in the act of incorporation. But that reading would preclude corporations from appearing judicially in their own names—would place them on a plane with minors and interdicts—and therefore is evidently not the true reading.

The "the" before the words "act of incorporation," in the article, should be "their," and the true reading be that corporations act judicially through their proper representatives under the name or title given them in their (not "the") act of incorporation. The "the" in place of the "their" crept into the revision of 1870 by a manifestly clerical error, as appears by reference to the text of the original Code, and especially by reference to the French text. It is well known that the English text of the original Code was a translation from the French, the Code having been written in French.

Corporations, then, act judicially in their own names. Of course, judicially and in every other way, they act through their proper representative. Being mere ideal persons they cannot, in the nature of things, act in their own persons; but the Code does not say that these representatives shall be named in the petition, nor, as in the case of minors and interdicts (article 109), that these representatives act themselves, without making their principals parties to the suit. It is notable that when a corporation is sued its president or other officer need not be designated. The suit is brought directly against the corporation by name. Article 119, Code Prac.

New Orleans Terminal Co. v. Teller

It has been held that without special authorization the president of a police jury cannot bring suit in his own name in behalf of the police jury, and that the absence of the special authorization need not be specially pleaded, but may be taken advantage of under the general denial by assignment of error on appeal. *Hoffpauir v. Wise*, 38 La. Ann. 704.

At common law it seems to have been at one time questionable whether a corporation could not appear judicially even without the intervention of an attorney at law. *Ency. of Pleading & Practice*, vol. 2, p. 699.

In the case of *Ins. Oil Tank v. Scott*, 33 La. Ann. 946, 39 Am. Rep. 286, this court held that the failure to state the name of the officer of the corporation in the petition was a defect, but that the defect was cured by proof of the suit having been brought by authority of the board of directors. So, in the case of *Lacaze & Reine v. Creditors*, 46 La. Ann. 239, 14 South. 601, the court treated the case as one involving the question of whether the suit had been brought by authority, and held that, although no officer was named in the petition, yet that the petition was sufficient, because the affidavit of the vice president was itself sufficient proof of the suit having been authorized.

In these cases the court seems to have confounded between the want of authority to bring the suit and the failure to name the president or other officer of the corporation in the petition. But the want of authority is one thing—it goes to the substance; the failure to name the officer is another and entirely different thing—it is a mere matter of form. If the petition was fatally defective in form, how could the defect be cured by proof that the suit had been authorized, which had absolutely nothing to do with form? In effect, therefore, the decision of the court was that, so long as the suit is duly authorized to be brought, the failure to name the president or other officer is insignificant.

In the *Scott Case* the court did not discuss the question of whether the failure to name the president or other officer of the plaintiff in the petition was or not a defect, but seems to have assumed that it was. In the *Lacaze & Reine Case* the court cited article 112, Code Prac., and interpreted it as requiring that the president or other officer of the corporation be named in the petition. A different view is now taken, and the court holds that the suit may be brought simply in the name of the corporation, without naming its president or other officer.

The second exception was without merit, and, this being so, the error of the lower court in not passing upon it cannot furnish good grounds for setting aside the judgment and remanding the case for another trial.

Under full reserve of the exception, defendant filed an answer, in which, after a general denial, and an admission of

New Orleans Terminal Co. v. Teller

the ownership of the property in question, she went on to allege and plead as follows:

"Third. Further answering, respondent says: That the plaintiff herein pretends to be a corporation organized under the laws of the state of Louisiana for the purposes of constructing or acquiring and operating a line of railway from the city of New Orleans, in the state of Louisiana, to the city of Chicago, in the state of Illinois, 'upon such line as may hereafter be selected by the company.'

"That said railroad would be about eight hundred miles in length, and would cost, to construct and equip, from fifty to one hundred millions of dollars.

"Your respondent shows that the authorized capital stock of the plaintiff herein is only two million dollars, and that plaintiff's charter contains a provision that the plaintiff company should be a going concern, authorized to do business, when six thousand dollars of its capital stock shall have been subscribed. Respondent avers that only said six thousand dollars of the capital stock of the plaintiff corporation has been subscribed for, and respondent denies that even the said six thousand dollars of stock so subscribed for has ever been paid in.

"Respondent further shows that the plaintiff herein has not executed any mortgage of any sort for the purpose of raising money.

"Respondent further shows that the plaintiff herein has not selected any route or line for a railroad between the cities of New Orleans and Chicago, has not surveyed or attempted to locate any such line, has not procured or attempted to procure any terminal facilities in the city of Chicago, and has not contracted for the building of any part of the railroad line between said cities, nor even for the survey or location of any such line.

"Respondent denies that it is the intention of the plaintiff corporation, or of the shareholders of said corporation, to build any line of railroad between said cities of New Orleans and Chicago.

"Further answering, respondent says:

"That the city of New Orleans cannot by its ordinances confer upon any corporation any right to expropriate private property; that the right of expropriation is one conferred and limited by the Constitution and statutes of the state of Louisiana, and is not in any respect enlarged in favor of the plaintiff herein by the ordinance of the city of New Orleans No. 1615, N. C. S., which is pleaded and relied on in the petition herein.

"Respondent further shows that it is the declared purpose of the plaintiff herein to expropriate fifty consecutive squares of ground for the terminal facilities of said railway line from New Orleans to Chicago, which it is apparent the same corporation has neither the means to construct, nor any inten-

New Orleans Terminal Co. v. Teller

tion of attempting to construct, and which respondent avers never will be constructed.

"Respondent denies that it is the intention of the plaintiff corporation to expropriate and acquire said squares of ground for the purposes of said railroad line mentioned in plaintiff's charter, and avers that it is the design of the plaintiff to acquire said squares of ground for other purposes.

"Respondent expressly denies that it is the intention of said plaintiff to acquire respondent's square of ground for the purposes of a right of way for its railroad line.

"Respondent denies that the plaintiff corporation has any need of any land in the city of New Orleans for the terminal facilities, as the said plaintiff does not own and has not the means of building or acquiring any line of railroad into the city of New Orleans, and will never acquire or own any line of railroad running into said city from Chicago or any other point.

"Respondent further shows that the petition herein does not disclose the purposes for which plaintiff conceives that it needs and is justified in expropriating said square of ground, and respondent denies that said square of ground is necessary to the plaintiff for any purpose whatever.

"Respondent shows that the quantity of ground which the plaintiff herein declares that it is its intention to expropriate exceeds the area of ground owned for terminal purposes by any one of the great railroad lines coming into this city, and is vastly more than would be needed by the plaintiff corporation if its imaginary line from New Orleans to Chicago were actually built and in operation.

"Respondent denies that plaintiff has the right, under the laws of the state of Louisiana, even if it were a bona fide railway corporation, to expropriate land for which it has no present use, and which it does not intend at present to use for railroad purposes, but which it proposes to acquire now and hold, because property is now cheap, in order to resell at a profit hereafter, or to hold for its use and needs hereafter.

"Respondent shows that the plaintiff corporation herein seems to be the successor and enlargement of a certain defunct warehousing corporation lately known as the New Orleans & Western Railroad Company, which organized under a charter that purported to contemplate and intend a railroad line from New Orleans, La., to Dallas, Texas, which railroad was never built nor attempted to be built, but that in lieu thereof the said New Orleans & Western Railway Company constructed enormous cotton compresses and warehouses and wharves at a place below the city known as Port Chalmette, and went extensively into the business of warehousing, compressing, storing, and shipping cotton, which cotton was transported into said warehouses by a feeder or switch line a few miles in length; that the real purpose of said New

Orleans & Western Railway Company was to engage in the business of compressing, storing, and shipping cotton and other commodities; that it never had any idea or purpose of building a railroad into Texas, but pretended such purpose solely to mask and conceal its true purpose, and to acquire rights from the city of New Orleans, and the right to expropriate private property.

"Respondent shows further that the said New Orleans & Western Railway Company became insolvent in its said warehousing business, and its property was thrown into the hands of a receiver and sold; that the persons who purchased said property are now consolidating their said warehousing property so acquired from said receiver with the plaintiff corporation herein (a fact that indicates that the real object of the present corporation is to continue the warehousing business of said defunct corporation at Port Chalmette), and that the property (including respondent's) which plaintiff wishes to acquire in this city is to be used for such warehouses in order to meet the disastrous competition which said defunct corporation had to engage in with the cotton compresses and other warehouses situated in the city of New Orleans; and respondent avers that such is the true intent and purposes of the plaintiff herein, and that the line of railroad from New Orleans to Chicago spoken of in plaintiff's charter is a mere blind and pretext, and will no more be built than was the line from New Orleans to Dallas, mentioned in the charter of said defunct corporation, the New Orleans & Western Railway Company.

"Respondent further shows that, if the object of the plaintiff corporation is not as above stated, then its object is simply to acquire property in this city suitable for railroad terminal purposes, and then to sell the property so acquired to any railroad that will buy the same at a sufficient advance, and to sell for manufacturing and business sites that portion of the area so acquired which will not be needed for railroad terminals; and respondent denies that the plaintiff herein has any right to expropriate respondent's property for any such speculative purposes.

"Respondent avers that the pretended purposes of the plaintiff corporation, as set forth in its charter, to build a line of railroad from New Orleans to Chicago, is not its true purpose, and is a mere pretext and simulation, the object of which is to give plaintiff the apparent right to expropriate property which it then intends to use for other purposes or for speculative purposes, all of such a nature that plaintiff would not be entitled to exercise for such real purposes the right of expropriation under the laws of the state of Louisiana.

"Fourth. Respondent denies that the plaintiff corporation herein is a real and serious corporation, and avers that it is a mere paper corporation, having possibly a legal form of existence, but no real life, no capital stock, and no assets,

and that it is not such a corporation as is authorized by law to institute expropriation proceedings.

"Fifth. Respondent further avers that the property herein sought to be taken is not being taken for public use or for public purposes, but for purposes of private benefit and speculation only.

"Sixth. That the property herein sought to be expropriated is vastly more than would be needed for the terminal purposes of the railway line mentioned in the charter of plaintiff, even if such railway line were actually built and in operation, and is more than would be needed for terminal purposes by such railroad line for the next fifty years; and respondent denies that such corporation is entitled now, even if it were a genuine and bona fide corporation, to expropriate property for which it may never have any use, and for which it will certainly have no use for a great many years to come.

"Seventh. And should the above-stated pleas and defenses be overruled, and should this court hold that plaintiff corporation is entitled to expropriate respondent's property, then respondent avers that her said square is well worth the sum of \$12,500."

The learned judge *a quo* interpreted this answer as attacking the corporate existence of the plaintiff, and, under the doctrine that the corporate existence of a litigant corporation cannot be called in question collaterally, he excluded evidence offered by defendant in support of the allegations of her answer.

But such is not the purport of this answer. While it calls the plaintiff a mere paper corporation, it admits its existence as a corporation. What it denies is that plaintiff is a public utility, or, in other words, a genuine railroad corporation. It charges that plaintiff has assumed the garb of a public utility corporation in order to be enabled under that disguise to expropriate property which it is seeking to obtain for purely private purposes; i. e., to speculate with by reselling to some railroad company or other person at an advanced price, or itself to put to some private use—probably to convert into warehouse or other building sites. In the alternative, it charges that plaintiff should not be permitted to expropriate the property, because plaintiff is not now able and may never be able to put the same to a public use; plaintiff being utterly without the means of building a railroad; plaintiff's entire scheme being, up to the present time, purely speculative.

Surely this is a defense which, if made out, would defeat plaintiff's suit, and which, therefore, defendant was entitled to urge, and to support by any available relevant evidence.

In the case of *Williams v. Judge*, 45 La. Ann. 1295, 14 South. 57, this court said:

"Relators have the undeniable right to contest in the courts with the railroad company in question whether its

purpose is one of public utility, and whether the use to which it seeks to put relator's property is a public use.

"What constitutes public utility and public purposes is for the courts to determine."

In the case of Edgewood Railroad Company, 79 Pa. 257, the Supreme Court of Pennsylvania said:

"The commonwealth transfers to her citizens her power of eminent domain only when some existing public need is to be supplied, or some present advantage is to be gained. She does not confer it with a view to contingent results which may or may not be produced, and may or may not prove successful or disastrous. * * * The capital of the corporation has been nearly, if not entirely, expended. * * *

"Hardly as the rule may bear on these defendants; it is the plain duty of the courts to prevent the perversion of enactments passed for one purpose in order to subserve other and inconsistent objects."

In the matter of Metropolitan Transit Company, 111 N. Y. 588, 19 N. E. 645, the Court of Appeals of the state of New York held (quoting the syllabus):

"As a condition upon which the court could be asked to intervene in its favor to enable it to acquire lands and street rights, the company was obliged to show, under oath, that it is its intention, * * * in good faith, to construct and finish a railroad from and to the place named in its articles of association. Laws 1850, p. 216, c. 140, § 14.

"In the petition presented by said company for the appointment of commissioners of appraisal to determine the amount to be paid to the city for the use of the streets included in the routes of said company, it was stated that 'it was the intention of said company, in good faith, to construct, operate, and maintain a railroad on the lines mentioned in said act.' The city answered—among other things, denying that it was the intention of the company to construct and operate a road as mentioned in said act of 1872. On the hearing, after the company had offered evidence on the question of intent, the city offered evidence to contradict it and to controvert the expressed intent. This was excluded, the court holding that the application was sufficient proof of the intent. Held error.

"It seems that if it had not been alleged in the petition, and put in issue by the answer, that the company in good faith intended to build the road, proof that it did not intend would have been proper, and would have shown 'cause against the granting of the petition.' Laws 1850, p. 218, c. 140, § 15."

In the same connection the following cases are apposite: Pittsburgh, W. & K. Co. v. Benwood Ironworks et al. (W. Va.) 8 S. E. 453, 2 L. R. A. 680; B. & N. Railway, 72 N. Y. 245; Niagara Falls & Whirlpool R. Co., 108 N. Y. 375,

New Orleans Terminal Co. v. Teller

15 N. E. 429; Weidenfield v. Sugar Run Ry. Co. (C. C.) 48 Fed. 615, 618; Matter of Deansville Cemetery Ass'n, 66 N. Y. 569, 23 Am. Rep. 86; Matter of Staten Island Rapid Transit Co., 103 N. Y. 251, 8 N. E. 548; Denver v. Union Pac. Ry. Co. (C. C.) 34 Fed. 386.

In the above cases the plaintiff corporations had been organized as railroad corporations, but nevertheless the defendant property owners were permitted to raise the question of whether the property was to be put by the plaintiffs to a public use.

But there ought not to be any need of citation of authority on a proposition so plain. Because a corporation is organized as a railroad corporation, and says in its petition that it wants the property for a public purpose, it does not follow that the property is not sought to be taken for a private purpose. What men say in their notarial acts and in their petitions is not always true. It is none of the business of the defendant property owner in an expropriation suit to inquire into the purposes for which the plaintiff corporation has been organized. That is the business of the state. But it is his business, and, in a sense, nobody else's, whether the purpose for which the property is sought to be expropriated is a public purpose. Therefore, in defense to the expropriation suit, he can, as a matter of course, raise the question as to whether the purpose of the taking is public. Whatever may be the reasons why, in his opinion, the purpose is not public, he has the constitutional right to urge them and to prove them, and to have the courts pass upon their sufficiency.

Of this Constitution-given right the Legislature would be powerless to deprive him.

The excluded evidence was the following:

While the president of the plaintiff corporation was on the stand, defendant's counsel propounded to him the following questions, to wit:

"(1) Where does the New Orleans Terminal Company deposit its money?

"(2) How much of the capital stock of the corporation has been paid in?

"(3) How much of the capital stock has been subscribed for?

"(4) Does this corporation pay for what it buys with its own money?

"(5) What surveyors, if any, has the New Orleans Terminal Company employed for the purpose of running lines?

"(6) What workmen, if any, have been employed by the New Orleans Terminal Company to lay out and construct tracks and terminals in the city of New Orleans?

"(7) What work, if any, has been done by the New Orleans Terminal Company along the line of building any kind of railroad from New Orleans to Chicago?

"(8) What rolling stock, if any, has been purchased or owned by the New Orleans Terminal Company?

“(9) What books of account, if any, does the New Orleans Terminal Company keep?

“(10) What resources has the New Orleans Terminal Company to pay for these properties [i. e., properties in the vicinity of the property to be expropriated, testified by the witness as having been bought by the St. Louis & San Francisco Railroad Company in the name of L. L. Stanton, with the object and purpose of transferring them to the New Orleans Terminal Company]?”

Defendant put on the stand one of plaintiff's counsel, and propounded to him the following questions, to wit:

“(1) Is it not true that you are one of the subscribers to the stock of the New Orleans Terminal Company?

“(2) How much stock do you hold in the New Orleans Terminal Company?

“(3) Has the stock that you own in this company been paid for, and, if so, in what manner?

“(4) How much stock of the New Orleans Terminal Company has been subscribed for?

“(5) How much stock of this railroad company that has been subscribed for has been paid for?

“(6) Did the New Orleans Terminal Company pay for those surveys [i. e., those made of the proposed line from Memphis to New Orleans, previously stated by the witness to have been made for its benefit]?

“(7) Does the company keep any ledger, journal, cash-book, or bank deposit?

“(8) Was the railroad of the New Orleans & Western Road ever built to Dallas?”

These questions were objected to on two grounds, both of which were sustained:

“First. That the questions were irrelevant to and did not tend to prove any issue in the case.

“Second. That, if the object in asking the questions was in support of that part of defendant's answer which attacked the existence of the plaintiff corporation collaterally, then the evidence was not admissible.”

The second of these grounds has already been disposed of hereinabove. The first ground was equally untenable. The questions are certainly relevant.

Assuming that to the first question the answer would have been that the plaintiff deposited its money nowhere, because it had none; and the answer to the second and to the third, that none of the plaintiff's stock had been paid in or even subscribed for; to the fourth, that the plaintiff does not pay with its own money for what it buys; to the fifth, sixth, and seventh, that no surveyors had been employed for running lines, nor workmen employed to lay out and construct tracks and terminals in the city of New Orleans, and no work done by plaintiff towards building any kind of railroad; to the eighth, that no rolling stock has been purchased; to the

New York, etc., R. Co. v. Offield

ninth, that no books of account are kept, except a minute book and a stock subscription book; and finally, to the tenth, that the plaintiff has no resources to pay for the properties it is seeking to expropriate—assuming that these answers would have been given, they assuredly would have gone some way towards substantiating the allegations. They were therefore relevant.

Whether they would of themselves, and without further evidence, have proved the allegations of the answer, is another question, and one which is not now before this court for decision.

What has been said regarding the questions propounded to the president of plaintiff is equally applicable to the questions propounded to its counsel.

Plaintiff objects to the sufficiency of the bill of exceptions by which the ruling of the court upon the admission of the above evidence is brought up for review. The bill shows that the questions were asked and were objected to on the grounds that they were a collateral attack upon the organization of the plaintiff corporation, and moreover were in themselves irrelevant, and that the court sustained the objection and ruled out the evidence. For our part, we cannot imagine what more could have been stated. Plaintiff's learned counsel says that defendant should have stated what answers were expected by the witness. This would have been necessary if the questions had not themselves furnished sufficient information to enable the court to pass intelligently upon the matter.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and the case remanded for further trial; plaintiff to pay the costs of this appeal, and the costs of the lower court to abide the final decision of the case.

NEW YORK, N. H. & H. R. CO. v. OFFIELD.

(Supreme Court of Errors of Connecticut, Dec. 16, 1904.)

[59 Atl. Rep. 510.]

Condemnation of Stock of Another Railroad Company—Constitutionality of Statute.

Laws 1895, c. 232 (Gen. St. 1902, § 3694), authorizing a railroad company, which has acquired more than three-fourths of the stock of another railroad company, and cannot agree with the holders of the outstanding stock for purchase thereof, to condemn it on a finding that it will be for the public interest, is within the power of the Legislature.

Same—Public Interest.

It is for the public interest that a railroad company condemn the few shares of stock of another railroad company, which it does not own, where extensive improvements of the other company's connecting road are necessary, the means or credit for which it does not, but the condemning company does, possess.

Same—Private Use.

That condemnation by a railroad company of the few shares of another railroad company which it does not already own may be for a

New York, etc., R. Co. v. Offield

private use is precluded by the charter of the condemning company, by the terms of which such acquisition will ipso facto work a merger of the stock and franchises of the other company in those of its own.

Same—Exclusive Privileges—Constitutional Law.

Exclusive privileges from the community are not given, in violation of Const. art. 1, § 1, by Laws 1895, c. 232 (Gen. St. 1902, § 3694), authorizing any railroad company acquiring more than three-fourths of the stock of another railroad company, and unable to agree with the holders of the outstanding stock for purchase thereof, to condemn the same.

Due Process of Law.

One whose property is taken by condemnation proceedings is not deprived thereof without due process.

Impairing Obligation of Contract.

The obligation of a contract is not impaired by Laws 1895, c. 232 (Gen. St. 1902, § 3694), authorizing a railroad company acquiring more than three-fourths of the stock of another railroad company, and unable to agree with the holders of the outstanding stock for purchase thereof, to condemn it.

Case Reserved from Superior Court, New Haven County;
Edwin B. Gager, Judge.

Action by the New York, New Haven & Hartford Railroad Company against Charles K. Offield to condemn shares of stock of the New Haven & Derby Railroad Company owned by defendant. Reserved on a demurrer to the complaint for the advice of the Supreme Court of Errors. Judgment overruling demurrer advised.

George D. Watrous and Henry H. Townshend, for plaintiff.
Charles K. Bush and Edward H. Rogers, for defendant.

BALDWIN, J. For many years any railroad company of this state has had a statutory right to take a lease of the property or franchises of, or to lease its own property or franchises to, any other such company with whose tracks its own may connect, and no limitation has been prescribed as to the term of the lease, provided it should be approved by a two-thirds vote of the stockholders in each. Gen. St. §§ 3702, 3703. In 1889 and 1899 the plaintiff was empowered to increase its capital stock until the year 1910, for the purpose of exchanging shares in it (on terms to be approved by a committee consisting of two officers of the state and a lawyer to be appointed by the Governor) for shares in the capital stock of any railroad company whose road it might be holding under a lease running for not less than 50 years, or of buying such shares. Until the entire capital stock of any such leased line should be so obtained, such shares as might be obtained were to remain in the plaintiff's control "as its property, the said stock to be used for all purposes of income, corporate organization, management and franchise; but for all other purposes, including purposes of taxation, it shall be deemed to be transferred to and merged into the stock of the New York, New Haven and Hartford Railroad Company, subject, nevertheless, to the right of any proper court to control the undue exercise of such power of voting

New York, etc., R. Co. v. Offield

on said stock for the protection of other stockholders." Should it "retire all of the capital stock of any such leased line, by purchase or exchange, the executive officers of said respective companies shall certify the same by certificate to be filed in the office of the State Secretary, and the said stock of said leased line and all its franchises shall thereupon be and be deemed to be forever transferred to and merged in the stock and franchise of the said New York, New Haven and Hartford Railroad Company." 10 Sp. Acts, 1298; 13 Sp. Acts, 41. Pursuant to the powers thus granted, the plaintiff has taken a lease of the New Haven & Derby Railroad for 99 years from July 1, 1892, at a net rental of 4 per cent. a year on its capital stock, and has acquired 4,468 shares of its capital stock, which is divided into 4,470 shares of the par value of \$100 each. The leased railroad has a mileage of less than 17 miles, and a funded indebtedness of \$1,280,000. It connects at New Haven, on the east, with four, and at its western terminals with two, important railroad lines owned by the plaintiff, and forms a link in an all-rail route between Boston and the West, which is the only one controlled by the plaintiff, and the only one of any kind controlled by it over which goods can be transported with assured dispatch in all weathers and at all seasons. To develop this route so as to best serve the public interest requires the laying of additional tracks on the New Haven & Derby Railroad, and other extensive and very costly improvements. The lessor company has neither means nor credit whereby this can be effected on advantageous terms. The plaintiff could and will effect it, and at much less cost, if it can acquire the two outstanding shares of the stock of the lessee. They are owned by the defendant, who refuses to agree on terms of purchase.

It has become the settled policy of this state, evidenced by a long course of legislation, to allow the consolidation of connecting railroad properties under one management. It is for the public interest that railroads should be built in such a manner as to make them most useful to the public. When, to attain that end, large expenditures must be made, it is for the public interest that the requisite funds should be secured by those making the outlay and operating the railroad on such terms and conditions as to impose upon them no unnecessary burden; for, whatever that burden is, its weight, by increasing the fixed charges which they must meet, is apt ultimately to fall upon those traveling or forwarding goods over the railroad. The plaintiff's railroad is a great highway for public use. Every improvement upon it furthers the public use, and, the more economically it is made, provided it be well made, the more is such use promoted, because it will cost the public less. The charges for railroad transportation must always be reasonable, but in determining what is reasonable the actual expense of construction is a legitimate

subject of consideration. The record shows the credit of the New Haven & Derby Railroad Company to be such that, if it could provide the means for the projected improvement of its property at all, it must be by contracting loans at a higher rate of interest than would be paid by the plaintiff for similar assistance. This being so, the public interest would be better served by having the plaintiff do the work. That it is a necessary work in order to make the railroad of the greatest service to the public is admitted by the demurrer. It will therefore promote the use for which the line was originally constructed. Whatever, in the nature of a property interest, stands in the way of such promotion, the state can put aside. Any kind of property can be taken for public use on making just compensation. The whole franchise of a corporation may be so taken. *Enfield Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40, 42 Am. Dec. 716; *Id.*, 17 Conn. 454, 44 Am. Dec. 556; *Greenwood v. Freight Co.*, 105 U. S. 13, 22, 26 L. Ed. 961. Its whole property may be likewise taken. *Bigelow v. Union Freight R. Co.*, 137 Mass. 478. Shares of stock represent an undivided interest in such franchises and property, and for the same reason can be taken, if to take them seems to the state necessary in furtherance of public uses. *Black v. Delaware & R. C. Co.*, 22 N. J. Eq. 130; *Id.*, 24 N. J. Eq. 455, 468, 484. That the uses to be furthered are public is a question the decision of which by the legislative department, while not absolutely conclusive upon the judicial department on a proceeding like the present, is entitled to very great weight. *New York, N. H. & H. R. Co. v. Long*, 69 Conn. 424, 436, 37 Atl. 1070. That to take property for the construction of a railroad by a private corporation is to take it for a public use is firmly settled. It is so taken because the public benefit will be promoted by such a railroad. *Bradley v. New York, N. H. & H. R. Co.*, 21 Conn. 294, 305. In like manner may it be promoted by improving such a railroad, and making it more useful. By taking the defendant's shares of stock the New Haven & Derby Railroad Company, which now survives as a mere shell, will become extinguished, and its franchise will become merged in that of the plaintiff. The General Assembly did not transgress their power in authorizing condemnation proceedings, when necessary, to brush such a gossamer of a corporation out of existence. Its survival can serve no useful purpose. Its extinction may facilitate and lessen the cost of the construction and improvements necessary to make the railroad of which it is now the owner fulfill its office to the best effect. *Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n*, 77 Conn. 88, 58 Atl. 467. Under the circumstances of this case the condemnation of the defendant's two shares of stock is in substance and effect a condemnation of the franchise and property of the company for a public use which it has ceased to serve efficiently.

Baltimore Belt R. Co. v. Sattler

It is contended that, if the plaintiff is allowed to take the defendant's shares, it becomes their absolute owner, and may sell them as such to private purchasers. Whether such a claim would be entitled to any regard were the defendant's shares not the only ones now outstanding, we need not inquire. Their acquisition, under the terms of the plaintiff's charter, will ipso facto work a merger, and preclude any possibility of their being applied to a private use.

It is further argued that the statutory permission to maintain an application of this nature is a grant to a set of men of exclusive privileges from the community, and so in violation of our Constitution, art. 1, § 1. The statute is for the benefit of all railroads to which its terms may apply. Railroad companies constitute a peculiar class of artificial persons, which can properly be invested with special privileges of a kind calculated to promote the public good. *Drouin v. Boston & M. R. R.*, 74 Vt. 343, 52 Atl. 957. Nor will the defendant be deprived of property without due process of law. This proceeding is due process. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L. Ed. 372. The claim that the statute impairs the obligation of a contract is equally groundless. When the defendant acquired his shares he became a member of a corporation charged with a public trust. It has acquired a railroad for public use. It has given a lease of it to the plaintiff, subject to the same trust, for public use. It is the right of the state to do whatever is necessary to secure its being put to the best use in fulfillment of the trust. *Gates v. Boston & N. Y. A. L. R. Co.*, 53 Conn. 333, 342, 5 Atl. 695.

Our advice is that the demurrer be overruled. No costs will be taxed in this court in favor of either party. The other Judges concurred.

BALTIMORE BELT R. CO. et al. v. SATTLER.

(Court of Appeals of Maryland, Jan. 12, 1905.)

[59 Atl. Rep. 654.]

Pleading.

Where matters are pleaded in confession and avoidance which would be admissible under the general issue, the fact that they are so admissible does not make the plea demurrable.

Injury to Property from Construction and Operation of Railroad—Liability in Absence of Negligence.

Where property is damaged beyond a mere incidental inconvenience, which unavoidably follows the exercise of charter powers by the construction of tunnels and the operation of railroad trains therein, property owners affected are entitled to recover the damages without proof of negligence of the railroad, though the construction of the tunnel and operation of the trains therein were under the direct authority of the Legislature of the state and the city wherein the tunnels were constructed.

Baltimore Belt R. Co. v. Sattler**Same—Direct and Consequential Damages.***

Damages may be recovered for injury to property by construction of a railroad whether they result from direct invasion or from consequential injuries.

Negligence—Application of Statute Changing Burden of Proof.

Code Pub. Gen. Laws 1889, art. 23, § 198, providing that if a railroad company injures any stock, or if injury is occasioned by fire from its engines, it shall be responsible for such injuries, unless it can prove that the injury complained of was committed without negligence on the part of the defendant or its agents, merely changes the burden of proof in such cases, and does not require an allegation of negligence on the part of a railroad in a suit for damages to property by the construction of tunnels and the operation of trains therein adjacent to the property.

Construction of Tunnel—Compliance with Ordinance—Expert Testimony.

In an action against a railroad for damage to property by the construction of tunnels and operation of trains therein adjacent to the property, where the case was tried on evidence offered under the general issue, expert testimony was admissible to show that the defendant had not complied with a city ordinance requiring defendant to cover an open space between the tunnels with a shed supplied with smoke escapes.

Examination of Witnesses.

A party is entitled on re-examination to interrogate a witness for the purpose of affording an opportunity of explaining answers given on cross-examination.

Injury to Property from Construction and Operation of Railroads—Increased Volume of Smoke—Expert Testimony.

In an action against a railroad for damage to property by the construction of tunnels and operation of trains therein adjacent to the property, expert testimony to show that the quantity of smoke cast on plaintiff's land was increased by the existence of the tunnels in that neighborhood over what it would have been if there had been no tunnels there was inadmissible.

Harmless Error.

Where plaintiff and others testified that smoke was collected in the tunnels, and forced into an open cut, and thence on plaintiff's land, error in the admission of expert testimony to show that the quantity of smoke cast on plaintiff's land was increased by the existence of the tunnels was harmless.

Evidence—Effect of Smoke on Other Property.

Evidence as to the effects produced by the smoke from the tunnels in the immediate neighborhood on property other than plaintiff's was admissible.

Expert Testimony.

Expert testimony as to the fact that smoke, vapors, and vibrations occasioned by the tunnels and operation of trains therein caused a diminution in the value of plaintiff's land was inadmissible.

Same.

Expert testimony as to the exact amount and extent of damage by construction and operation of railroad tunnels to adjoining property is inadmissible.

Appeal from Court of Common Pleas; Henry Stockbridge, Judge.

Action by George William Sattler against the Baltimore

*See foot-notes appended to *Stockdale v. Rio Grande Western Ry. Co. (Utah)*, 12 R. R. R. 527, 35 Am. & Eng. R. Cas., N. S., 527.

Baltimore Belt R. Co. v. Sattler

Belt Railroad Company and another. From a judgment for plaintiff, defendants appeal. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, and SCHMUCKER, JJ.

Duncan K. Brent and W. Irvine Cross, for appellants.
Oscar Wolff and A. S. Niles, for appellee.

FOWLER, J. This is an action to recover damages, brought by George W. Sattler, of Baltimore City, against the Baltimore Belt and the Baltimore & Ohio Railroad Companies for alleged injury to his property, caused by smoke and unwholesome vapors discharged by the engines which are run over the Belt Railroad, and by the large amount of noise and vibration caused by such engines and the trains of the defendants. The narr. alleges "that by reason of the said discharge of smoke and offensive and unwholesome vapors upon the plaintiff's land, and by reason of the said noise and vibration as aforesaid, upon the plaintiff's said land, it is rendered far less desirable for dwelling or building purposes than it otherwise would be, the plaintiff is deprived of the profits and advantages that would reasonably inure to him from the development and improvement of his said property, and the value thereof is seriously impaired. * * *". The defendants pleaded the general issue. Subsequently they asked and obtained leave to file an additional plea. It alleges that the Belt Railroad Company, in the execution of the powers conferred on it by its charter and by the act of Assembly and by ordinance of the city of Baltimore, has constructed its railroad in the manner and upon the route prescribed, and said railroad is now being operated in the execution of the powers conferred on the Belt Railroad Company by its charter, the act of Assembly, and said ordinance; that the cars and engines operated over said road are all of the best modern type, and are operated in a careful manner; and that the noise, smoke, vapors, and vibration and other inconveniences complained of by the defendant result from the operation of its cars and engines in a lawful manner, and that any damage caused the plaintiff by the operation of said railroad has been caused by the necessary and unavoidable result of the operation of said cars and engines in a lawful manner. The plaintiff's demurrer to this plea was sustained, and the defendants withdrew their pleas previously filed and demurred to the narr. This demurrer was overruled, and the defendants filed a second additional plea, which, on motion of the plaintiff, was not received, whereupon the defendants refiled the general issue pleas and their first additional plea, a demurrer to which last-named plea had already been sustained. It was again demurred to, and the demurrer again sustained. During the course of the trial a large number of exceptions were taken to rulings upon the admissibility of evidence and one to the action of the court upon the prayers.

The judgment was in favor of the plaintiff, and this is the defendants' appeal.

Before considering the questions that are presented by the record and relied on here, it may be proper to say that we are not called on to discuss the ruling of the court below on the defendants' demurrer to the narr., nor that relating to the plaintiff's motion *ne recipiatur*, because the former is presented by the demurrer which was sustained to the additional plea, and all objection to the latter was abandoned at the hearing in this court.

The first question presented arises upon the action of the lower court in sustaining plaintiff's demurrer to the defendants' additional plea. The demurrer is based upon two grounds: First, that the plea amounts to the general issue; and, second, that it asserts the legal proposition that the plaintiff is not entitled to recover damages for the injury alleged in the declaration without proof of negligence. Counsel for both sides concur in saying that the second ground of this demurrer is the main, and by far the most important, question involved in this appeal. Whether, therefore, the plea is subject to the criticism that it amounts to the general issue, and for that reason is defective, is quite immaterial, for the main question, namely, whether the plaintiff can recover without alleging and proving negligence on the part of the defendants, is also presented by the demurrer to the narr. and by the ruling of the court on the plaintiff's prayers. Briefly, then, in regard to the first ground of this demurrer. We do not think the plea is bad on the first ground relied on. Under the strict rules of pleading the defendants have a right, if they so elect, to plead specially defenses in confession and avoidance which would be admissible in evidence under the general issue, and the fact that they are so admissible does not make the plea bad. *Poe's Pl.* § 641; *De Lauder v. Baltimore Co.*, 94 Md. 7, 50 Atl. 427. Thus in this plea the defendant says substantially: "Yes, I confess that there is smoke, and there are the other things complained of by the plaintiff; but they all necessarily result from the operation of our cars, engines, and road in a lawful manner." The plea, therefore, is a plea of confession and avoidance. *McAllister v. State*, 94 Md. 300, 50 Atl. 1046; *Keedy v. Long*, 71 Md. 388, 18 Atl. 704, 5 L. R. A. 759. Before proceeding to discuss the main question presented by the demurrer, perhaps it would be desirable for the purpose of clearness to state the facts of the case more at large than we have already done.

It appears from the evidence that the plaintiff has for many years lived at 2619 North Charles street, Baltimore, and that he is the owner of the two lots of ground, the damage to which is the basis of this suit; that one of the lots is 100 feet front on Charles street immediately south of the open cut of the Baltimore Belt Railroad, and run-

Baltimore Belt R. Co. v. Sattler

ning back 184 feet; that the other lot fronts 50 feet on Charles street, with the same depth as the first-named lot; that between these two lots there is a lot 50 feet front on Charles street, with same depth as the others just named, on which is situated the house in which plaintiff resides, but does not own; that the two lots first named, damage to which is here claimed, are used as a garden, and contain shade trees, walks, fruit trees, flowers, etc.; that there are two tracks in the open cut of the Baltimore Belt Railroad immediately north of this property, over which tracks a great number of trains pass during the day and night. The tunnel runs a little beyond the front yard of plaintiff's lot, to the north, and the smoke and the gas and the vibration are caused by the trains. The plaintiff testified, as did other witnesses, that as soon as the trains come out of the tunnel into the open cut in front of his lots they draw the smoke out of the tunnel, and it is cast upon his property to such an extent that everything is dirty and unpleasant; that the noise and vibration caused by the trains are very unpleasant. There was also a mass of testimony in regard to the injurious effects on the value of the plaintiff's property caused by the injuries complained of, which will be considered later; but the question now is whether, assuming the plaintiff's property was injured in the manner and to the extent alleged in the narr. and admitted by the plea, he can recover without showing negligence on the part of the defendants.

1. The case of *Short v. Baltimore City Passenger Railway Co.*, 50 Md. 73, 33 Am. Rep. 298, was much relied on by the defendants. There it was held by the majority of this court that the defendant company was not liable, without proof of negligence, for damage to plaintiff's house, caused by obstructing the natural flow of water in the street, due to clearing snow from its tracks; and Judge Robinson said, in delivering the opinion of the court, that the broad question was presented whether damages could be recovered irrespective of the question of negligence on the part of the railway company, and that the true test in actions of that kind by which exemption from liability is to be determined is whether in the act complained of the owner has used his property in a reasonable, usual, and proper manner, taking care to avoid unnecessary injury to others. It was upon *Short's Case*, supra, and the provision of our Code (Pub. Gen. Laws 1889, § 198, art. 23) that the defendants based their contention that there can be no recovery in this case without proof of defendants' negligence. The section of the Code just referred to provides that railroad companies shall be responsible for damages resulting in the killing of cattle, etc., or by fire from their engines, unless they "can prove * * * that the injury complained of was committed without any negligence." Undoubtedly, if the rule laid down

Baltimore Belt R. Co. v. Sattler

in Short's Case is applicable in all its breadth to this, the defendants' contention needs little more to sustain it, so far as Maryland authority is concerned, for that case declares that, if the act there complained of was lawful, and if the defendant used its property in a reasonable, usual, and proper manner, taking care to avoid unnecessary injury to others, no recovery can be had, even though damage should follow such use. The plea, the demurrer to which we are considering, alleges that the injuries here complained of are only such as necessarily and unavoidably result from the operation of the road lawfully. Let us, therefore, in the first place, examine Short's Case, in order to see what is the full scope of the rule there laid down by the majority of the court and the grounds upon which it is based; and then, secondly, to ascertain whether the provisions of the Code just referred to have any bearing upon the question raised by this demurrer. What are the facts of the Short Case? On the 6th January, 1877, there was a heavy fall of snow, and in clearing its track the Baltimore City Passenger Railway Company threw the snow off towards the curb, and thereby, as it was alleged, obstructed the natural flow of the water at the corner of Gay and Hoffman streets. A very heavy rain—"one of unusual severity"—followed the snow, and the plaintiff's house was flooded with water. He asked the court to instruct the jury that if they should find that the railroad company obstructed the natural flow of the water on the street, and by reason of such obstruction plaintiff's house was flooded, he was entitled to recover. This prayer was modified by the court below to the effect that, if the defendant company exercised ordinary care in removing the snow from its track, and that the damage was attributable either to the conformation of the ground and the situation of the injured premises, or to a storm of such extraordinary severity that the usual drainage provided by the city would not carry the water off, then their verdict should be for the defendant. This prayer, as modified, was granted. And in the opinion of the court the conclusion arrived at is placed upon two grounds: First, that the defendant, in the act complained of, was, as matter of law, using its property "in a reasonable, usual, and proper manner"; and, second, that if, as matter of fact, the damage was attributable to the conformation of the ground, or to a storm of extraordinary and unusual severity, the plaintiff could not recover. So that what was decided as matter of law in Short's Case was this, and no more: that the act complained of in that case was authorized by the charter of the defendant and the ordinances of the city of Baltimore, and that, therefore, "the throwing of the snow on the bed of the street was using the street in a usual, reasonable, and proper manner," and that the plaintiff could not recover unless the defendant was guilty of negligence. Without intending to question the decision in Short's Case, so far as applicable to

the facts of that case, we do not think it affords the defendant any justification in asking us to sustain its plea in the case now before us. What is that plea? We have already recited its substantial allegations. It is sufficient now to recall that it alleges that all the injurious acts complained of in plaintiff's declaration are only such as necessarily result from the operation of defendants' road and the running of their cars and engines. While the demurrer, of course, admits all matters of fact well pleaded, it does not admit matters of law, and hence the question whether the acts complained of in the declaration and admitted by the plea are authorized and justified by defendants' charter and the city ordinances must ultimately be decided by the court, and not by the jury. whether, therefore, the defendants, in the construction of the tunnel and in the operation of their road and the running of their engines and cars, were acting in a lawful manner, depends upon their charter and the ordinances of the city of Baltimore passed in pursuance thereof. By their charter they were authorized to build their road for the most part through a tunnel through the city of Baltimore, with the consent and upon the conditions prescribed by the ordinances of the city. By Ordinance 83, § 5, certain provisions were enacted, providing how the tunnel should be ventilated in addition to the ventilation afforded by the mouths thereof; and by section 14 of the same ordinance it was declared that the provisions of said ordinance shall be deemed conditions of the consent of the municipal authorities to the passage of said road through the city of Baltimore, and as prescribing the manner, terms, and conditions upon which the streets, etc., or ground of any kind in said city, may be used by said railroad company. This ordinance was approved May 14, 1890. Ordinance 84, approved on the same day, provided that in the open cut immediately north of the plaintiff's lot should be established a station, the train sheds of which shall, however, be so constructed as to cover the whole of the railroad tracks and platform in said cut, and be provided with smoke escapes, the tops of which shall be not less than 25 feet above the level of Charles street. It is further provided that the provisions of this ordinance shall be construed to all intents and purposes as though they had been inserted in Ordinance 83 and hence the compliance with the provision of this ordinance requiring the covering of the open cut, from which the narr. alleges and the plea admits all the damage complained of arises, is expressly made a condition to the consent of the municipal authorities to the passage of railroad through the city. Now, the narr. alleges and the plea admits that the plaintiff's property was damaged by the smoke, noise, vapor, etc., which was caused by the running of the defendants' trains. The plea also alleges that all this injury was the unavoidable result of the operation of defendants' cars in a lawful manner. Of course, this last allega-

Baltimore Belt R. Co. v. Sattler

tion is not admitted by the demurrer, because matters of law never are so admitted. Therefore the demurrer does not admit that the acts which produced the injury were lawful. The charter and Ordinance 83 referred to in the plea do undoubtedly authorize the defendants to run trains through the tunnel, and therefore it could lawfully do so; but surely it cannot follow that because the defendants allege they did this lawful act in a lawful manner it necessarily follows they did so. Whether they did or did not is a question of law for the court to decide. In the face of the allegations of injury to plaintiff's property, all of which are conceded, can we say that the defendants acted in a lawful manner? No one—neither private individual nor a corporation—has the right in the use of his property to injure his neighbor as it is conceded the plaintiff is injured by the acts complained of. Such injuries are neither in fact nor law only such as necessarily follow the lawful use of chartered privileges. Not so in fact, because we all know from observation and experience that such lawful use does not produce the result alleged, and, if it did, it would be impossible to reside in close proximity to railroads; and not so in law, because it is the law everywhere that every one shall so use his own property as not to injure his neighbor. But not only so, we have frequently held that, where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to a neighboring owner for which an action will lie. And this, too, without regard to the locality where such business is carried on, and although the business may be a lawful business, and one useful to the public, and although the best and most approved appliances and methods may be used in the conduct and management of the business. *Susquehanna Fertilizer Co. v. Malone* (Md.) 20 Atl. 900, 9 L. R. A. 737, 25 Am. St. Rep. 595; *Same v. Spangler* (Md.) 39 Atl. 270. This rule applies to individuals and corporations alike. From what we have said it will appear that, while the court held in *Short's Case* that in the act there complained of the defendant company, in view of their charter and the ordinances of the city, used the street in a reasonable and proper manner, and that, if there was no negligence, no recovery could be had, we are of opinion that in this case, while the defendants had the right to run their trains, they had no right given them by their charter or otherwise to operate them in such a manner as to injure the plaintiff's property to the extent it is conceded it was injured.

It will be observed that the plea is based upon and refers only to its charter and Ordinance 83 of 1889-1890 as justifying its acts and making them lawful. No reference whatever is made to the later Ordinance No. 84 of 1890, nor to No. 81 of 1901, and both of which it was agreed should be and were

offered in evidence, and by the first of which the defendants were required to build certain sheds with smoke escapes, and by the second of which they were relieved of that duty upon certain conditions.

If, then, as we have said, the injuries to the plaintiff's property were such as alleged and admitted, it would be impossible for the defendants to successfully seek protection under their charter, the acts of Assembly, or the city ordinances. In *Cogswell v. N. Y., etc., R. Co.*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701, it was held that "the statutory sanction which will justify an injury to private property by a railroad corporation, and without the consent of the owner, must be express, or given by clear and unquestionable implication from the powers expressly conferred, so that it can be said that the Legislature contemplated the doing of the very act which occasioned the injury." If it be assumed, however, that the Legislature of Maryland intended to confer power upon the defendants not only to use the open cut and tunnel, but also to use them in such a way as is alleged and admitted—i. e., to the serious injury of the plaintiff, and his great discomfort—and at the same time deprive him of all remedy, such legislation would, we think, clearly be invalid. Thus, in the case of *Stevens v. Canal*, 12 Mass. 466, it was held that if, in such a case, where private property is taken by authority of the Legislature without affording at the same time means of relief and indemnification, the owner of the property would undoubtedly have his action for damages at common law against those who should cause the injury. For although it might be lawful to do what the Legislature should authorize, yet to enforce the principles of the Constitution for the security of private property it might be necessary to consider such legislation as inoperative so far as it trenchd upon the rights of individuals. This decision announces only well-settled law. *Pumpelly v. Green Bay*, 13 Wall. 166, 20 L. Ed. 557.

2. But if it could be assumed that the Legislature and city of Baltimore intended to and did give the defendants the right to do the very acts which resulted in such serious damage, then under the well-settled rule laid down in the *Reaney Case*, 42 Md. 117, the fact that the acts were lawful, and free from negligence, would not protect the defendants, if damage follows. We might say here as was said in the case just cited: "In this case the jury have found that the property of the plaintiff has been damaged to the extent of \$3,000, and it would be a reproach to the law if the courts were required to determine that it was a case of *damnum absque injuria*, and that there was no redress for such a wrong." Of course, it may be conceded that if the damage which resulted was only that incidental inconvenience which unavoidably follows the exercise of charter powers, we might say, as was said in *Baltimore & P. R. R. Co. v. Baptist Church*, 108 U. S. 317, 2

Baltimore Belt R. Co. v. Sattler

Sup. Ct. 719, 27 L. Ed. 739, that such damage is without remedy, and that "the private inconvenience in such case must be suffered for the public accommodation." But we have already said that, in our opinion, the damages and injuries here alleged and admitted are not of such a character.

But again, if in view of our decisions it could be said that the injuries to the plaintiff's property do not amount to an actual invasion, does that fact exculpate the defendants? It is argued that the lawful act done in the Reaney Case, for which there was a recovery, resulted in an actual invasion, and that hence that case has no application here. But there are a number of other cases in which it has been held that a recovery may be had for consequential injuries caused by a lawful act even when there is "no taking"; so that an action lies in both cases. Garrett's Case, 79 Md. 277, 29 Atl. 830, 24 L. R. A. 396; Reaney's Case, 42 Md. 117; L. R. R. v. Webster, 81 Md. 529, 32 Atl. 186; and other cases not necessary to cite. Why there should be any difference made in the right to recover if there is an actual invasion and when the damage is only consequential, it is difficult to understand, for the damage, loss, inconvenience, and discomfort to the owner may be as great in one case as in the other. In *Guest v. Church Hill*, 90 Md. 689, 45 Atl. 882, we held that the overflowing of the land of an individual with water is an invasion thereof; and the fact that smoke, noise, and vapor caused the injury here can make no difference; certainly none in the right to recover. *Adams v. Michael*, 28 Md. 123, 17 Am. Rep. 516, and *Fertilizer Co. v. Spangler*, 86 Md. 562, 39 Atl. 270.

We will not stop to discuss the conflict of authority upon this question. In some of the text-books, as well as in the decisions of some of the courts of last resort, a contrary view is held; but in the recent case of *N. Y., etc., R. Co. v. Jones*, 94 Md. 37, 50 Atl. 423, Judge Pearce, in delivering the opinion of this court, said that the case of *Hatch v. Vermont Cent. R. Co.*, 25 Vt. 50, opinion by Judge Redfield, in which it was held that railroad companies are not liable for necessary consequential damages accruing to premises not taken, could not be approved. So that we may say that the law is settled in the state by a number of cases that damages may be recovered whether they result from direct invasion or from consequential injuries.

3. We do not perceive what application the provisions of article 23, § 198, Code Pub. Gen. Laws 1889, have to this question. It is there provided that if railroad companies injure any stock, as cattle, horses, etc., or if injury is occasioned by fire from their engines, "unless the said company can prove to the satisfaction of * * * the tribunal before which the suit may be tried that the injury complained of was committed without negligence on the part of the com-

pany or its agents, they shall be responsible for such injuries." Upon its face this statute changes in the special cases mentioned the recognized burden of proof. Before it was passed, in order to recover for injuries to cattle, etc., as therein mentioned, the plaintiff could not maintain his suit unless he proved negligence. Now, however, he may prove the injury, and it becomes the duty of the defendant to prove that the injury was committed without any negligence. But we are not to assume that this statute makes any other change either in the general law or in the rule regulating the burden of proof in any other respect. The duties and liabilities of railroad corporations in relation to the owners of property along their roads remain the same in all other respects. Hence, if the defendants would have been liable before article 23, § 198, Code Pub. Gen. Laws 1889, was adopted, for the injuries here complained of, it is liable now. And if the defendants were liable—as we have already said they were—irrespective of this provision of the Code, they still so continue. We are of opinion that the demurrer was properly sustained. What we have said also disposes of the questions raised by the exception to the ruling on the prayers.

4. This brings us to the exceptions relating to the rulings upon the testimony. Defendants' sixth, seventh, and tenth exceptions were taken to the allowance of questions to be asked several witnesses for the purpose of showing defendants' violation of the Ordinance No. 84 of 1889-1890, which was offered in evidence without objection. This, it will be remembered, is the ordinance which required the defendants to cover the open space with a shed supplied with smoke escapes. In the first place, both of the witnesses to whom these questions were addressed were shown to be experts, and it seems to us that sufficient ground was laid in their preliminary examination to qualify them to testify as experts on the subject of the ventilation of tunnels. We have held that the defendants' plea was bad, and therefore the case was properly tried on the evidence offered under the general issue plea. In effect, the defendants' defense was, as said in *N. Y., etc., R. Co. v. Jones*, supra, nothing more than a denial of the right of the plaintiff to recover, and it was therefore proper for him to prove that the defendant had failed to comply with the requirements of the ordinance in question. The testimony involved in these exceptions (the sixth and seventh) related to this ordinance, and the failure of the defendants to erect the required sheds and smoke escapes, and was therefore admissible. The ninth exception was taken to the asking of one of the witnesses on re-examination a question for the purpose of affording him an opportunity of explaining some of his answers given on cross-examination. This, of course, was proper and legitimate. The eighth exception was taken to the admission of certain testimony of Mr. Hook, who testified as an expert on the ventilation and

construction of tunnels. The testimony objected to was this: That in his opinion the quantity of smoke cast on Mr. Sattler's land was increased by the existence of the tunnels in that neighborhood over what it would have been if there had been no tunnels there. It does not appear to us that the fact proposed to be proved by this witness is such testimony as can be given by an expert. The court, or any member of the jury, knew quite as well as the witness that, if the road ran all the way through an open cut, the smoke would be distributed all along the whole distance, and necessarily there could not be so much of it at any particular point. The fact, however, that the smoke is collected in the tunnels, and forced into the open cut, and thence upon the plaintiff's land, was testified to by the plaintiff and others, and hence the defendants were not injured by the proof of the witness' opinion to the same effect. The thirteenth, fourteenth, twenty-sixth, and twenty-ninth exceptions were taken to the admission of testimony as to the effects produced by the smoke, etc., in the immediate neighborhood on property other than the plaintiff's. This testimony was admissible. How better could the plaintiff establish his case? If his property alone, of all others similarly situated, was affected, and if he alone, of all those who lived near the open cut, was made uncomfortable, the jury might well have said it was his fault, and not that of the defendants. And the only way to show that others and their property were affected in the same way, though perhaps in different degrees, was to show this condition by those who were personally acquainted with the situation. *Cooper v. Randall*, 59 Ill. 317; *Doyle v. M. R. Co.*, 128 N. Y. 495, 496, 28 N. E. 495. Exceptions fifteenth, twenty-first, twenty-seventh, thirty-first, thirty-second, and thirty-third rest upon the admission of expert testimony as to the fact that the smoke, vapors, vibration, etc., caused a diminution in the value of the plaintiff's lots, and exceptions sixteenth, seventeenth, nineteenth, twentieth, twenty-second, twenty-third, twenty-fourth, and twenty-fifth are based upon the action of the court in allowing expert testimony to show the amount or extent of the damage. The general rule, of course, is that facts, and not opinions, must be given in evidence. Expert testimony is a well-known exception to this settled rule; and the question, then, is whether the testimony just referred to is included within the exception. The rule in regard to the admissibility of expert testimony is well settled. In the case of *Stumore v. Shaw*, 68 Md. 19, 11 Atl. 362, 6 Am. St. Rep. 412, it is thus stated by the late Judge Miller, who delivered the opinion of the court: "There is a general concurrence of authority and decisions in support of the proposition that expert testimony is not admissible upon a question which the court or jury can themselves decide upon the facts; or, stated in other words, if the relation of facts and their probable results can be determined without special

Baltimore Belt R. Co. v. Sattler

skill or study, the facts themselves must be given in evidence, and the conclusions or inferences drawn by the jury." Again: "Where the question can be decided by such experience and knowledge as are ordinarily found in the common walks of life, the jury are competent to draw the proper inferences from the facts, without hearing the opinions of witnesses." *Turnpike Co. v. Leonhardt*, 66 Md. 73, 5 Atl. 346. Without undertaking to lay down any general rule, it appears to us that, certainly so far as the proof of the fact of damage is concerned, there ought not to be any doubt. It can hardly be said that it requires either special knowledge or skill to enable a witness who has seen the property in question, and has observed the effects of the alleged injurious acts, to say whether the condition thereby produced is beneficial or otherwise. Strictly speaking, perhaps, no witness, whether expert or not, should be allowed to draw from the facts the conclusion that the property is damaged, for the jury are quite as competent to do that as the witness. But we believe the practice in this state has been otherwise, and witnesses who are acquainted with the property, and have observed the effects of the alleged tort, have been generally allowed after giving the facts to the jury to testify as to the fact of damage. In regard to the other question, whether expert testimony is admissible to prove the exact amount of damage, there is a wide difference of opinion. In 2 *Lewis on Eminent Domain*, § 436, it is said that such testimony has been held admissible in the following states: Arkansas, California, Illinois, Maine, Massachusetts, Minnesota, Missouri, Oregon, Pennsylvania, Texas, West Virginia, and Wisconsin, while the contrary has been held in Alabama, Georgia, Indiana, Iowa, Kansas, Nebraska, New Jersey, New York, and Rhode Island. It is not desirable to enlarge the limits within which expert testimony is admissible, and whenever the ultimate fact desired to be proved is, from the nature of the issue, especially confided to the jury, such evidence should be rigidly excluded. The object for which the jury is sworn—that is to say, if they find there is damage—is to find the extent of it, measured in dollars and cents. But to allow the expert to give such testimony not only puts him in the place of the jury, but permits him to indulge in mere speculation. Witnesses who are competent for that purpose may testify as to the value of the property before and after the alleged injury. But it by no means follows that the injury is the sole cause of the diminution, if any exists. Whether it is or not, or to what extent, is for the jury, and not the witness, to determine. In *Roberts v. N. Y. E. R. R. et al.*, 128 N. Y. 464, 28 N. E. 487, 13 L. R. A. 499, *Peckham, J.*, said: "The first question asked of this witness to which exception is taken * * * calls for his opinion as to the amount of damage. * * * The precise question which is to be determined by the court and jury is by this interrogatory placed

Baltimore Belt R. Co. v. Sattler

before the witness for his opinion and decision. To permit it to be answered is, beyond all question, against the great mass of authority in this and other states." Again quoting from the same case: "Expert evidence of the actual value of real estate is proper, and in many cases essential. The present value of the property of the plaintiff can be proved by expert evidence—both the value of the fee and the rental value. Both classes of value could also be proved by expert evidence as of a time immediately prior to the building of this road. They are opinions based on facts which now exist or which once existed, and, if the expert have knowledge of them, he should be permitted to state it. As to what the value would have been under circumstances which never existed, he knows and can know nothing, but must form an opinion wholly speculative in its nature, which opinion must be based on data perfectly easy for him to state, and from which, when once stated, an ordinarily intelligent jury can draw as just and fair an inference of a possible, yet conjectural, value, as could the expert. And that very inference must in some way be drawn by the jury, for it is the question it is called upon to decide." *Roberts v. Railroad*, *supra*. But it has often been said that it would be inconsistent to hold that testimony as to the exact amount of damage is not admissible, and at the same time admit proof of value before and after the injury (2 *Lewis on Eminent Domain*, § 436; *Rogers on Expert Testimony*, § 153), leaving it to the jury only to make the simple calculation involved in subtracting the one value from the other. But the error of this view, we think, consists in assuming that that is the only duty the jury have to perform in this respect. We have already indicated our view in regard to the respective provinces of the jury and the witness in this important matter. In *Railway Co. v. Gardner*, 45 Ohio St. 323, 13 N. E. 69, the Supreme Court of that state held that the primary facts which enable the jury to determine the extent of the injury are the values of the land before and after the alleged tort. "If it be contended," said Chief Justice Owen, "that when a witness has stated what, in his opinion, is the difference in the value of the land before and after the location of the road, or how much less it is worth after than before, he has substantially stated the substantive fact to be ascertained [that is to say, the amount of damage], the obvious answer is that he is, by this form of inquiry [that is, the inquiry, "How much is the damage?"] left to estimate in his own mind the amount of damages sustained, and give this to the jury as the difference in value. There is no assurance that he will, in making his estimate, take into account the actual value before and after the location of the road. Indeed, there is no assurance that he may have an intelligent opinion of the value of the land affected either before or after such location, except that he has qualified himself in the opinion of the court as a wit-

Camden Interstate Ry. Co. v. Smiley

ness." It is, of course, no answer to say that the witness may be cross-examined, for that has never been considered a test of the competency of a witness or the admissibility of testimony. We are of opinion, therefore, that it was error to have permitted experts to give their opinions as to the fact as well as to the exact amount of damage.

What we have said covers all the exceptions relied on in the brief of the defendants. All others were abandoned at the hearing in this court. It follows that for the errors indicated the judgment must be reversed.

Judgment reversed, and new trial awarded.

CAMDEN INTERSTATE RY. CO. *v.* SMILEY.

(Court of Appeals of Kentucky, Jan. 20, 1905.)

[84 S. W. Rep. 523.]

Obstruction of Street—Railroad Viaduct—Injury to Abutting Property—Amendment of Petition.

Where, in a suit by the owner of property abutting on a street for an injunction restraining the erection of a railroad viaduct in the street, it appeared that she was entitled to damages if the allegations of the petition were true, it was not error after the dissolution of the injunction to permit plaintiff to amend her petition so as to pray for the recovery of damages.

Same—Same—Same—Right to Damages.*

Where a railroad viaduct 10 or 12 feet high was erected in the central part of a street, leaving only the space of 21 feet between the viaduct and the property line of an abutting owner and 11 feet between the viaduct and sidewalk, he was entitled to damages for depreciation of value owing to the obstruction of ingress or egress.

Instructions.

Where, in an action by the owner of property abutting on a street for damages owing to the obstruction of ingress and egress by the erection of a railroad viaduct in the street, the court plainly told the jury in three succeeding instructions that they could give plaintiff damages only for the obstruction of ingress and egress, a fourth instruction that the jury should ascertain the market value of the property just before it became known that the viaduct was to be built, and then ascertain what portion of that value had been taken from that property by the viaduct, and that such amount would be the damages, was not erroneous on the theory that it allowed the jury to find for plaintiff for depreciation of value not due to obstruction of ingress and egress.

Excessive Verdict.

In an action by the owner of property abutting on a street for damages by the erection of a railroad viaduct in the street, plaintiff's evidence having tended to show that her property was worth about \$1,250 before the construction of the viaduct, and that it had been damaged in the sum of \$625, and it appearing that the space between the sidewalk and the viaduct was only 11 feet in front of the property, and that the same had been seriously impaired, a verdict for \$425 was not excessive.

*See generally, foot-notes appended to *Stockdale v. Rio Grande Western Ry. Co.* (Utah), 12 R. R. R. 527, 35 Am. & Eng. R. Cas., N. S., 527.

Camden Interstate Ry. Co. v. Smiley

Appeal from Circuit Court, Boyd County.

"Not to be officially reported."

Action by Annie E. Smiley against the Camden Interstate Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

T. R. Brown, for appellant.

R. S. Dinkle and P. K. Malin, for appellee.

HOBSON, C. J. Appellee owns a lot fronting 120 feet on Mound street, in Catlettsburg, Ky., having on it two dwelling houses, which she rented to tenants. Appellant was building along Mound street a viaduct some 10 or 12 feet high, which occupied the central part of the street, leaving only the space of 21 feet between her property line and the base upon which the viaduct rested, and, after deducting the sidewalk of 10 feet, only about 11 feet for teams to drive on. The purpose of the viaduct was to raise appellant's track so as to get up to the bridge over the Big Sandy river. It rested on trestle work. Bents were placed 18 feet apart, the bents resting on concrete pedestals 2 feet square. While appellant was building the structure, appellee brought this suit to enjoin it from continuing the erection in the street on the ground that it was a taking of her property by appellant without first paying a just compensation therefor, as the ingress and egress to and from her property would be materially affected. An answer was filed by the defendant, and on the hearing before the circuit judge upon affidavits the court dissolved the injunction which had been granted by the clerk. The plaintiff thereupon amended her petition, charging that the viaduct was a permanent obstruction in the street, unreasonably destroying ingress to and egress from her property, and damaging it in the sum of \$1,250, for which she prayed judgment. The case was then, on her motion, transferred to the ordinary docket, where it was heard before a jury, who returned a verdict for her in the sum of \$425, on which the court entered judgment.

It is insisted that the court erred in allowing the amended petition to be filed seeking damages for the obstruction of the street. The courts have a wide discretion in allowing amendments, and, as it had been held that the construction of the viaduct would not be enjoined, we do not see that there was any substantial error in allowing the plaintiff to amend her petition and claim damages for the injury to her property. The plaintiff was manifestly entitled to damages if the statements of her petition were true, and, although she was not entitled to enjoin the construction of the viaduct, the court, in furtherance of justice, should not have left her remediless, and refused to allow her to amend her petition and ask the relief to which the facts she stated entitled her. *McHugh v. Louisville Bridge Company*, 65 S. W. 456, 23 Ky. Law Rep. 1546. While the proof was conflicting, there was sufficient evidence of obstruction of the ingress to and egress

Camden Interstate Ry. Co. v. Smiley

from the property to justify the submission of the case to the jury. *Ashland & Catlettsburg Street Railway Company v. Faulkner*, 45 S. W. 235, 51 S. W. 806, 21 Ky. Law Rep. 156, 43 L. R. A. 554; *L. & N. R. R. Co. v. Cumnock* (Ky.) 77 S. W. 933; *Henderson v. McClain*, 43 S. W. 700, 19 Ky. Law Rep. 1452; *Ludlow v. Detweiler*, 47 S. W. 881, 20 Ky. Law Rep. 895.

The court instructed the jury as follows: "(1) The court instructs the jury that if they believe from the evidence that the defendant, in constructing its viaduct on Mound street, appropriated and obstructed the street adjacent to plaintiff's lot so as to deprive plaintiff of the reasonable use of the said street as a means of ingress and egress to and from said property, they will find for the plaintiff, and fix the damages as in instruction No. 4. (2) The court instructs the jury that they are not authorized to find any damages for plaintiff if they believe from the evidence that sufficient space in Mound street is left between plaintiff's property and defendant's viaduct on said street to permit the reasonable use of same for ingress and egress to and from said property by vehicles in ordinary and general use. (3) The court instructs the jury that if they find for plaintiff under instruction No. 1, that they are only permitted to find for the plaintiff such depreciation of value, if any, of plaintiff's property as they believe and find is due to the obstruction, if any, to the reasonable use of Mound street adjacent to plaintiff's property for travel by any vehicle in ordinary and general use to and from plaintiff's property, and the jury are not permitted to include in any finding they may make any depreciation in the value of plaintiff's property that they may find to be due to the operation of defendant's line of street railway on the viaduct in Mound street adjacent to plaintiff's property, or to the unsightliness of defendant's viaduct, or to any fear by horses from operation of cars on said viaduct, or to mere proximity of or inconvenience from defendant's viaduct that does not obstruct the reasonable use of Mound street adjacent to plaintiff's property for travel by any vehicle in ordinary and general use to and from plaintiff's property. (4) If the jury find for plaintiff under instruction No. 1 they will first ascertain from the evidence the fair market value of the property in question just before it became generally known that the viaduct of the defendant was to be built on Mound street adjacent to said property. They will then ascertain from the evidence what portion of that value, if any, has been taken from same by reason of the construction of said viaduct on Mound street adjacent to said property, and the amount so found is the sum plaintiff is entitled to recover, not exceeding twelve hundred and fifty dollars." The principal complaint is that instruction No. 4 takes off the brakes allowing the jury to find for appellee whatever of the value of the property had been taken from it by the construction.

Harrington v. Iowa Cent. Ry. Co

of the viaduct. All the instructions of the court are to be read together, and when the four instructions above quoted are so read they could not have misled the jury. By instruction 3 the jury were told plainly that they could not find for the plaintiff on account of certain things, but only for the damages from the obstruction of ingress and egress to and from the property. This is plainly set out in instruction No. 1. It is repeated in instruction No. 2, and is reiterated in instruction No. 3. The plaintiff's evidence tended to show that her property was worth about \$1,250 before the construction of the viaduct, and that it had been damaged by its construction in the sum of \$625, as teams could not pass on the space of 11 feet, and loaded wagons could not turn and go under the viaduct. The proof was somewhat conflicting as to whether a wagon could turn and pass under the viaduct, but as to the space left there was no conflict in the evidence, and it was reasonably clear from the proof that the ingress and egress to and from the property was seriously impaired. The jury fixed the damages at \$425, and we cannot say that the verdict is so excessive as to warrant us in disturbing it. Judgment affirmed.

HARRINGTON v. IOWA CENT. RY. CO.

(Supreme Court of Iowa, Jan. 13, 1905.)

[102 N. W. Rep. 139.]

Injury to Property—Obstruction of Street—Railway Embankment—Right to Damages.*

Where a railroad embankment obstructs a street affording access to property used for business purposes, the owner may recover the consequent depreciation in the value of the property.

Vacation of Street—Title to Land.

On a vacation of a street by a city under Code, § 751, the title of the land formerly occupied by the street does not revert in the abutting owners, but remains in the city, and may be disposed of for other purposes.

Same—Railroad Purposes—Injury to Property—Liability of Railroad.

Where a city, under authority of Code, § 751, vacated a street for railroad purposes, one whose property was specially injured by the railroad embankment obstructing travel could not recover of the railroad.

Same—Same—Construction of Ordinance.

Where the enacting clause of an ordinance recited that a certain street was vacated to a railroad company, and the purpose and effect of the ordinance was not otherwise stated or explained, a proviso to the effect that title to the street vacated should vest in the city when the railroad company should cease to use the street for railroad purposes did not show that the ordinance did not vacate the street, but only gave the railroad the right to use it.

Appeal from District Court, Mahaska County; Byron W. Preston, Judge.

Action to recover damages to property by reason of the

*See foot-notes appended to Stockdale & Rio Grande Western Ry. Co. (Utah), 12 R. R. R. 527, 35 Am. & Eng. R. Cas., N. S., 527.

Harrington v. Iowa Cent. Ry. Co

obstruction of a street by the defendant. Verdict and judgment for plaintiff. Defendant appeals. Reversed.

George W. Seevers and J. O. Malcolm, for appellant.
Davis & Orris and McCoy & McCoy, for appellee.

McCLAIN, J. Plaintiff's premises, used for manufacturing purposes, fronted on Second avenue, in the city of Oskaloosa, and are about 150 feet distant from Kossuth street, which runs north and south and crosses Second avenue at a right angle. In 1870 the city granted to the Central Railway Company of Iowa the right to lay its tracks over and along Kossuth street and across any streets or alleys intersecting that street, and this right was exercised and enjoyed by that railroad company and the defendant, its successor in interest, by constructing and maintaining a track along Kossuth street as far south as the intersection of Second avenue, until 1897, when by ordinance Kossuth street, and the portion of Second avenue intersecting it, and portions of other streets were vacated to the defendant, with the provision that when defendant should cease using the streets vacated for railroad purposes all right and title thereto should again become vested in the city, as before the passage of the ordinance. Thereupon defendant erected an embankment at the intersection of Kossuth street and Second avenue, which, as plaintiff claims, has diminished the value of her premises by cutting off access thereto from the direction of Kossuth street along Second avenue. No doubt, if Kossuth street and the portion of Second avenue intersecting it had not been vacated, plaintiff, showing special damage by reason of the obstruction of a street affording access to her property used for business purposes, would have the right to recover as damages the depreciation in the value of her property due to the obstruction of the street, if such obstruction was shown. *Park v. C. & S. W. R. Co.*, 43 Iowa, 436; *Dairy v. Iowa Central R. Co.*, 113 Iowa, 716, 84 N. W. 688. But the city had the right to vacate the portions of the streets referred to (see Code, § 751), and on such vacation the title of the portions of land formerly occupied by the streets did not revert in the abutting owners, but remained in the city, and such portions could be disposed of for other purposes. *Marshalltown v. Forney*, 61 Iowa, 578, 16 N. W. 740; *Williams v. Carey*, 73 Iowa, 194, 34 N. W. 813; *Burlington Gas Light Co. v. Burlington C. R. & N. R. Co.*, 91 Iowa, 470, 59 N. W. 292; *McLachlan v. Town of Gray*, 105 Iowa, 259, 74 N. W. 773; *Lake City v. Fulkerson*, 122 Iowa, 569, 98 N. W. 376; *Barr v. Oskaloosa*, 45 Iowa, 275; Code, § 883. We need not discuss the validity of the ordinance vacating the portions of the streets, for no question of that kind is raised. Plaintiff could, no doubt, have had the action of the city in vacating Kossuth street, and thereby cutting off access to her premises along Second avenue from that direction, reviewed in a proper pro-

ceeding, and could have had relief as against the city if it was improper; but she cannot recover against the defendant for the use of the street after its vacation in such way as to merely obstruct travel thereon. *Barr v. Oskaloosa*, 45 Iowa, 275. That a vacated street may be appropriated by the city to railroad or other purposes inconsistent with its further use for public travel has been settled beyond controversy. *Marshalltown v. Forney*, 61 Iowa, 578, 16 N. W. 740; *Spitzer v. Runyan*, 113 Iowa, 619, 85 N. W. 782.

The real contention of counsel for plaintiff seems to be that the ordinance passed in 1897 did not purport to vacate the street, but only to give the defendant the right to use the street for railway purposes; but the language of the title and body of the ordinance is susceptible of no other construction than that the portions of streets referred to therein were vacated and given to the defendant for its exclusive use. It seems to us immaterial for present purposes that the fact of vacation and the purposes to which the vacated portions of streets are appropriated is expressed in one sentence. The language of the enacting clause of the ordinance is that the portions of the streets described "are hereby vacated to the Iowa Central Railway Company," and the purpose and effect of the ordinance is not otherwise stated or explained. The proviso that the title to the portions of streets vacated shall again become vested in the city when the railway company shall cease to use them for railroad purposes is merely a condition subsequent, and has no bearing in explaining the present purpose and effect of the ordinance. That which would have been an improper use of the portions of the streets in question had they never been vacated for public use, and would have constituted a nuisance for which plaintiff might recover damages, cannot be the basis of a cause of action against the defendant in view of the fact that such portions of streets are no longer subject to use as parts of public highways.

As we reach the conclusion that plaintiff has made out no cause of action against the defendant, it is unnecessary to discuss the errors relied upon in instructions to the jury as to measure of damages.

The judgment of the trial court is reversed.

MADISONVILLE TRACTION COMPANY, Appt., v. SAINT BERNARD MINING COMPANY.

(Submitted November 28, 1904. Decided January 16, 1905.)

[25 Sup. Ct. Rep. 251.]

Original Jurisdiction of Circuit Court over Eminent Domain Proceedings—Removal of Causes—Diversity of Citizenship.

A proceeding for the taking of land by eminent domain, authorized by Ky. Stat. §§ 835-839, to be begun in the courts of that state, is, where the requisite diversity of citizenship exists, a suit involving a

Madisonville Trac. Co. v. Saint Bernard M. Co

controversy between citizens of different states, of which a Federal circuit court has original jurisdiction, and is therefore removable to that court when commenced in the state court.

Time of Removal of Cause.

The time for removing to a Federal circuit court, for diversity of citizenship, a proceeding for the taking of land by eminent domain, begun in a Kentucky county court, under the authority of Ky. Stat. §§ 835-839, is not postponed until after the case has been taken by appeal to a state circuit court, where it can be tried *de novo*, inasmuch as under the state statute, the condemning party is entitled, even after such appeal, to pay into court the damages assessed in the county court, and, before the case is concluded in the higher court, to take possession of the land, and oust the owner.

Appeal from the Circuit Court of the United States for the Western District of Kentucky to review a decree enjoining a further prosecution in the County Court of Hopkins county, in that state, of a condemnation proceeding in which a sufficient petition and bond has been filed to effect the removal of the case to a Federal circuit court for diversity of citizenship. Affirmed.

See same case below, 130 Fed. 794.

The facts are stated in the opinion.

Messrs. David W. Fairleigh and N. T. Crutchfield for appellant.

Messrs. E. G. Seabee, C. J. Waddill, and Gordon & Gordon & Cox for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court:

The Madisonville Traction Company, a Kentucky corporation, having by its charter authority to construct an electric railroad, filed its application in the county court of Hopkins county, in that commonwealth, to condemn for its use certain lands belonging to the Saint Bernard Mining Company, a Delaware corporation engaged in mining coal,—the traction company being styled in the application as plaintiff, and the mining company as defendant.

The application was made under the Kentucky statutes relating to the condemnation of lands. The nature of those proceedings, whether judicial or not, appears from certain provisions of those statutes, which may be summarized as follows:

Any company authorized to construct a railroad, if "unable to contract with the owner of any land or material necessary for its use for the purpose thereof," may file in the office of the clerk of the county court a description of such land or material, and have commissioners appointed to assess the damages which the owner is entitled to receive. Ky. Stat. § 835.

The commissioners are required to make their award of damages in writing, giving the names of the owners, and whether nonresidents of the state, infants, of unsound mind, or married women. Ky. Stat. § 836.

Madisonville Trac. Co. v. Saint Bernard M. Co

It is made the duty of the clerk of the court, upon application of the company, to issue process against the owners, to show cause why the report should not be confirmed, and make such orders as to nonresidents and persons under disability as are required by the Civil Code of Practice in actions against them in the circuit court. Ky. Stat. § 837.

At the first regular term, "after the owners shall have been summoned the length of time prescribed by the Civil Code of Practice before an answer is required," the court must examine the report, and pass upon it. Ky. Stat. § 838.

If exceptions are filed by either party, a jury must be empaneled to try the issues of fact, and judgment rendered in conformity to the verdict, if sufficient cause to the contrary be not shown. Either party may appeal to the circuit court, the appeal to be tried de novo.

Upon the confirmation of the report of the commissioners or the assessment of damages by the court, as provided, and the payment to the owners of the amount due, as shown by the report of the commissioners when confirmed, or as shown by the judgment of the court when the damages are assessed by it, and all costs adjudged to the owner, the railroad company becomes entitled to take possession of the land and material, and to use the same for the purpose for which it was condemned as fully as if the title had been conveyed to it. But when an appeal is taken from the judgment of the county court by the company, it is not entitled to take possession of the land or material condemned until it pays into court the damages assessed and all costs. Ky. Stat. § 839.

The commissioners appointed by the county court, in the above proceeding, awarded \$100 as damages to be paid to the mining company.

Process having issued, the mining company, before any action was taken upon the report, filed its petition and bond for the removal of the case into the circuit court of the United States, alleging, among other things, that the value of the matter in dispute, exclusive of interest and costs, exceeded \$2,000. The petition for removal distinctly alleged, as the ground of removal, that the two companies were corporations of different states.

The sufficiency of the bond was not disputed. But the county court refused to recognize any right of removal, and the Kentucky corporation was about to proceed in the prosecution of its case in that court, despite the application for removal. Thereupon the Delaware corporation filed in the circuit court of the United States a complete transcript of the proceedings in the state court.

Subsequently the present original suit in equity was instituted in the Federal court by the mining company against the traction company. The bill, repeating the allegations in the petition for removal as to the diverse citizenship of the two corporations, showed that, notwithstanding what had

been done to have the cause removed, from the state court, the traction company was about to proceed to have the lands condemned in the case instituted in the county court. Among other things the bill alleged that plaintiff denied the right of the traction company to have the lands in question condemned, and averred that the report of the commissioners was insufficient in law; that the commissioners acted improperly, unfairly, and unfaithfully in their viewing of the land, in the preparation of their report, and in awarding damages; that \$100 was wholly inadequate as compensation, and was assessed and given under the influence of passion and prejudice, or some other illegal motive; that the land sought to be taken was worth, intrinsically, a great deal more than that amount; that the incidental damages done to the property of plaintiff in the construction of the road (which damages, under the laws of Kentucky, the said commissioners should have taken into consideration, and assessed, but did not, § 836) exceeded \$2,000; that the plaintiff's property and business will not be benefited in the least degree by the construction or prudent operation of the railroad; and that "it is proposed to deprive it of over 9 acres of its land, which, through its location, is valued at and is worth over \$2,500, and is so situated that such deprivation will irreparably injure and damage its remaining land."

The relief asked in the present suit was that the traction company be restrained and enjoined from further prosecuting the case in the county court, or taking any further steps therein.

The traction company demurred to the bill, one of the grounds of demurrer being that the circuit court was without jurisdiction or authority, under the Constitution and laws of the United States, to grant the injunction asked for, or any other relief. The circuit court sustained its jurisdiction and overruled the demurrer. The traction company stood by its demurrer, and a final decree was entered, enjoining that company from any further prosecution of the case in the county court.

It has been observed that the parties to the proceeding in the county court are corporations, and therefore each is to be deemed, for the purpose of suing and being sued in the Federal court, a citizen of the state by whose laws it was created. The questions presented by the record are these: was the proceeding in the state court a suit or controversy to which the judicial power of the United States extends? If a suit or controversy, was it removable to the circuit court of the United States? If removable, was it, in law, removed, and was it competent for that court, after the removal of the case, to enjoin the traction company from further proceeding in the state court?

We recognize the importance of these questions, and have given them the fullest consideration.

Certain principles, relating to the removal of cases, have been settled by former adjudications. They are:

1. If a case be a removable one, that is, if the suit, in its nature, be one of which the circuit court could rightfully take jurisdiction, then, upon the filing of a petition for removal, in due time, with a sufficient bond, the case is, in law, removed, and the state court in which it is pending will lose jurisdiction to proceed further, and all subsequent proceedings in that court will be void. *New Orleans, M. & F. R. Co. v. Mississippi*, 102 U. S. 135, 141, 26 L. Ed. 96, 98; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 14, 26 L. Ed. 643, 645; *National S. S. Co. v. Tugman*, 106 U. S. 118, 122, 27 L. Ed. 87, 89, 1 Sup. Ct. Rep. 58; *St. Paul & C. R. Co. v. McLean*, 108 U. S. 212, 216, 27 L. Ed. 703, 704, 2 Sup. Ct. Rep. 498; *Crehore v. Ohio & M. R. Co.*, 131 U. S. 240, 243, 33 L. Ed. 144, 145, 9 Sup. Ct. Rep. 692; *Kern v. Huidekoper*, 103 U. S. 485, 493, 26 L. Ed. 354, 357; *Marshall v. Holmes*, 141 U. S. 589, 595, 35 L. Ed. 870, 872, 12 Sup. Ct. Rep. 62.

2. After the presentation of a sufficient petition and bond to the state court in a removable case, it is competent for the circuit court, by a proceeding ancillary in its nature—without violating § 720 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 581) forbidding a court of the United States from enjoining proceedings in a state court—to restrain the party against whom a cause has been legally removed from taking further steps in the state court. *French v. Hay*, 22 Wall. 252, 22 L. Ed. 857; *Dietzsch v. Huidekoper*, 103 U. S. 494, 496, 497, 26 L. Ed. 497, 498; *Moran v. Sturgess*, 154 U. S. 256, 270, 38 L. Ed. 981, 985, 14 Sup. Ct. Rep. 1019. See, also, *Sargent v. Helton*, 115 U. S. 342, 29 L. Ed., 413, 6 Sup. Ct. Rep. 78; *Harkrader v. Wadley*, 172 U. S. 165, 43 L. Ed. 405, 19 Sup. Ct. Rep. 119; *Gates v. Bucki*, 4 C. C. A. 116, 12 U. S. App. 69, 53 Fed. 969; *Texas & P. R. Co. v. Kuteman*, 4 C. C. A. 503, 13 U. S. App. 99, 54 Fed. 551; *Re Whitelaw*, 71 Fed. 733, 738; *Iron Mountain R. Co. v. Memphis*, 37 C. C. A. 410, 96 Fed. 131; *James v. Central Trust Co.*, 39 C. C. A. 126, 98 Fed. 489.

3. It is well settled that if, upon the face of the record, including the petition for removal, a suit does not appear to be a removable one, then the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made. *Stone v. South Carolina*, 117 U. S. 430, 432, 29 L. Ed. 962, 963, 6 Sup. Ct. Rep. 799; *Carson v. Hyatt*, 118 U. S. 279, 281, 30 L. Ed. 167, 168, 6 Sup. Ct. Rep. 1050; *Burlington, C. R. & N. R. Co. v. Dunn*, 122 U. S. 513, 515, 30 L. Ed. 1159, 1160, 7 Sup. Ct. Rep. 1262.

So that the fundamental question here is whether the case, brought in the county court, was a removable one. If it was, then the decree of the circuit court, restraining the traction company from taking further steps in the local court after the removal of the case to the Federal court, was right; but if the

case was not a removable one, then the decree was erroneous.

The rule is now settled that, under the judiciary act of 1887, 1888 [24 Stat. at L. 552, chap. 373, U. S. Comp. Stat. 1901, p. 508, 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508] a suit cannot be removed from a state court unless it could have been brought originally in the circuit court of the United States. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. Ed. 511, 14 Sup. Ct. Rep. 654; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 39 L. Ed. 672, 15 Sup. Ct. Rep. 563; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. Ed. 543, 9 Sup. Ct. Rep. 173; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 48 L. Ed. 870, 24 Sup. Ct. Rep. 598.

Why could not the proceeding instituted in the county court have been brought originally in the Federal court? The case, as made in the county court, was, beyond question, a judicial proceeding; it related to property rights; the parties are corporate citizens of different states; and the value of the matter in dispute exceeded the amount requisite to give jurisdiction to the circuit court. It was, therefore, a proceeding embraced by the very words of the Constitution of the United States, which declares that the "judicial power shall extend . . . to controversies . . . between citizens of different states," as well as by the act of 1887 (§ 1), which declares "that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, . . . in which there shall be a controversy between citizens of different states." In view of these explicit provisions it is clear that the proceeding in the county court was a suit or controversy within the meaning both of the Constitution and of the judiciary act. We could not hold otherwise without overruling former decisions of this court. Let us see whether this be not so.

Referring to the clause of the Constitution defining the judicial power of the United States, Chief Justice Marshall, speaking for the court in *Osborn v. Bank of the United States*, 9 Wheat. 738, 819, 6 L. Ed. 204, 223, said: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

In *Kohl v. United States*, 91 U. S. 367, 376, 23 L. Ed. 449, 452, which was a suit in the circuit court of the United

Madisonville Trac. Co. v. Saint Bernard M. Co

States to condemn lands for a public building, this court, speaking by Mr. Justice Strong, said: "It is difficult then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statutes, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right."

Two cases very much in point are *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206, and *Searl v. School Dist. No. 2*, 124 U. S. 197, 31 L. Ed. 415, 8 Sup. Ct. Rep. 460.

Mississippi & R. River Boom Co. v. Patterson was a case of condemnation under a statute authorizing a county district court to appoint commissioners to appraise the value of the property to be taken. The local statute provided that if the appraisement was not satisfactory, the matter would be brought before the court, where the issues of fact would be tried by a jury, unless a jury was waived. It was a case of diverse citizenship, and, upon the petition of the defendant, a citizen of another state, it was removed from the inferior local court to the circuit court of the United States. One question was whether the case was, in its nature, excluded from the jurisdiction of the Federal court. Referring to the contention that the proceeding to take private property for public use was an exercise by the state of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, had no right to interfere by any of its departments, this court, speaking by Mr. Justice Field, said: "But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding before the courts between parties,—the owners of the land on the one side and the company seeking the appropriation on the other,—there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the state." Again, in the same case: "It has long been settled that a corporation will be treated, where contracts or rights of property are to be enforced by or against it, as a citizen of the state under the laws of which it is created, within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different states. *Paul v. Virginia*, 8 Wall. 177, 19 L. Ed. 359. And in *Gaines v. Fuentes*, 92 U. S. 20, 23 L. Ed. 524, it was held that a controversy between citizens is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation, and is presented by the pleadings for judicial determination. Within the meaning of these decisions, we think the case at bar was properly trans-

ferred to the circuit court, and that it had jurisdiction to determine the controversy."

Searl v. School Dist. No. 2 was also a proceeding for the condemnation of private property to public use for school purposes. It was commenced by petition filed in a county court, a subordinate tribunal of one of the counties of Colorado. The local statute authorized the compensation to be fixed by a jury of six freeholders, with a right of appeal. The question in the case was as to the removability of the case from the county court to the Federal court. This court, speaking by Mr. Justice Matthews, said: "Such a proceeding, according to the decision of this court in *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449, is a suit at law within the meaning of the Constitution of the United States and the acts of Congress conferring jurisdiction upon the courts of the United States." After referring to prior cases, including *Mississippi & R. River Boom Co. v. Patterson*, the opinion proceeds: "The fact that the Colorado statute provides for the ascertainment of damages by a commission of three freeholders, unless, at the hearing, a defendant shall demand a jury, does not make the proceeding from its commencement any the less a suit at law within the meaning of the constitution and acts of Congress and the previous decisions of the court. . . . It is an adversary judicial proceeding from the beginning. The appointment of commissioners to ascertain the compensation is only one of the modes by which it is to be determined. The proceeding is, therefore, a suit at law from the time of the filing of the petition and the service of process upon the defendant." 124 U. S. 199, 31 L. Ed. 416, 8 Sup. Ct. Rep. 461.

It will be observed, from an examination of the *Searl Case*, that this court cited with approval *Colorado Midland R. Co. v. Jones*, 29 Fed. 193, and the *Mineral Range R. Co. v. Detroit & L. S. Copper Co.*, 25 Fed. 515. Those cases fully sustain the proposition that the case brought in the state court was a suit within the meaning of the Constitution and the judiciary act.

In the first one named, which was a proceeding under a local statute in an inferior state tribunal for the condemnation of lands for the use of a railway company, Mr. Justice Brewer, then circuit judge, after referring to the local statute under which the company proceeded, and to *Mississippi & R. River Boom Co. v. Patterson*, and *Searl v. School Dist. No. 2*, held the case to be removable, although the proceedings for condemnation were somewhat different from those in an ordinary trial, saying: "I do not suppose that a state can, by making special provisions for the trial of any particular controversy, prevent the exercise of the right of removal. If there was no statutory limitation, the legislature could provide for the trial of many cases by less than a common-law jury, or in some other special way. But the fact that it

had made such different and special provisions would not make the proceeding any the less a trial, or such a suit as, if between citizens of two states, could not be removed to the Federal courts. If this were possible, then the only thing the legislature of a state would have to do to destroy the right of removal entirely would be to simply change and modify the details of procedure."

In *Mineral Range R. Co. v. Detroit & L. S. Copper Co.* Mr. Justice Brown, then district judge, after referring to *Mississippi & R. River Boom Co. v. Patterson*, and many other adjudged cases, said: "But conceding that if the only question in this case were the amount of damages to be paid by the railroad company, the jurisdiction of this court would be sustained by the authorities above cited, it is insisted that these cases are inapplicable, because, by the statute of this state, the jury or commissioners must pass upon the question of the necessity for taking the property, as well as the amount of damages to be awarded. But we think that, in this particular, counsel overlook the distinction between the power to condemn, which confessedly resides in the state, and proceedings to condemn, which the state had delegated to its courts. The proceeding is certainly not deprived of its character as a suit by reason of its taking cognizance of this additional question; and if it be a suit, the right of removal attaches. Whenever a right is given by the law of a state, and the courts of such state are invested with the power of enforcing such right, the proceeding may be removed to a Federal court if the other requisites of removability exist." 25 Fed. 520.

In the more recent case of *Smith v. Adams*, 130 U. S. 167, 173, 32 L. Ed. 895, 987, 9 Sup. Ct. Rep. 566, 568, Mr. Justice Field, speaking for the court, and referring to the clauses of the Constitution and the statutes relating to the judicial power and the courts of the United States, said: "By those terms are intended the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case, or controversy."

It may be here said that the provisions of the local statutes of condemnation, referred to in the above cases, are substantially the same as those in the Kentucky statutes.

We cannot doubt, in view of the authorities, that the case presented in the county court was a "suit" or "controversy between citizens of different states," within the meaning of the Constitution and the laws of the United States. It was, as already said, a judicial proceeding initiated in a tribunal which constitutes a part of the judicial establishment of Kentucky, as ordained by its Constitution (Ky. Const. § 140);

Madisonville Trac. Co. v. Saint Bernard M. Co

and the court, although charged with some duties of an administrative character, is a judicial tribunal and a court of record. *Fletcher v. Leight*, 4 Bush, 303; *Pennington v. Woolfolk*, 79 Ky. 13.

Are the above cases inapplicable by reason of their having been decided prior to the passage of the judiciary acts of 1887, 1888, limiting the right of removal to suits of which the circuit courts of the United States could take original cognizance? Clearly not. The difference between that act and the act of 1875 [18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508] is wholly apart from the present discussion; for both acts gave the circuit courts original jurisdiction of all suits having the requisite amount in dispute, and in which there was a controversy between citizens of different states. So that what was a suit or controversy to which, by reason of diverse citizenship, the judicial power of the United States extended under the act of 1875, must be deemed a suit under the acts of 1887, 1888. The only effect of the latter act, so far as the present question is concerned, was to restrict the right of removal from the state court to cases of which the circuit court could take original cognizance. And the present case, being a suit involving a controversy between citizens of different states, is manifestly of that character.

It is said, however, that when it is proposed to take private property for public purposes, the question of appropriation is one primarily and exclusively for the state to determine.

There ought not to be any dispute, at this day, in reference to the principles which must control in all cases of the condemnation of private property for public purposes. It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments. *Citizens Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *Cole v. LaGrange*, 113 U. S. 1, 6, 28 L. Ed. 896, 897, 5 Sup. Ct. Rep. 416. If the purpose be public, the taking may be outright, provided reasonable, certain, and adequate provision is made, at the time of appropriation, to ascertain and secure the compensation to be made to the owner. *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 659, 34 L. Ed. 295, 303, 10 Sup. Ct. Rep. 965; *Sweet v. Rechel*, 159 U. S. 380, 399, 40 L. Ed. 188, 196, 16 Sup. Ct. Rep. 43; *Western Union Teleg. Co. v. Pennsylvania R. Co.* (the present term) 195 U. S. 540, ante, p. 133, 25 Sup. Ct. Rep. p. 133. Any state enactment in violation of these principles is inconsistent with the due process of law prescribed by the 14th Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581; *San Diego Land & Town Co. v. National*

Madisonville Trac. Co. v. Saint Bernard M. Co

City, 174 U. S. 739, 754, 43 L. Ed. 1154, 1160, 19 Sup. Ct. Rep. 804; Smyth v. Ames, 169 U. S. 466, 525, 42 L. Ed. 819, 841, 18 Sup. Ct. Rep. 418. The position taken by the highest court of Kentucky on this general subject appears from Tracy v. Elizabethtown, L. & B. S. R. Co., 80 Ky. 259, 269. It was there said: "It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain, either as to the nature of the use or the necessity to the use of any particular property. For if the use be not public, or no necessity for the taking exists, the legislature cannot authorize the taking of private property against the will of the owner, notwithstanding compensation may be required."

Speaking generally, it is for the state, primarily and exclusively, to declare for what local public purposes private property within its limits may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned and taken. But the state may not prescribe any mode of taking private property for a public purpose, and of ascertaining the compensation to be made therefor, which would exclude from the jurisdiction of a circuit court of the United States a condemnation proceeding which, in its essential features, is a suit involving a controversy between citizens of different states. "A state cannot," this court has said, "tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts." Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 391, 38 L. Ed. 1014, 1021, 4 Inters. Com. Rep. 560. 14 Sup. Ct. Rep. 1047.

Now, it is true that the circuit court could not have the property in question condemned for local public purposes if the state had not previously, by statute, authorized its condemnation. After the removal of a case of condemnation from a state court, the Federal court would proceed under the sanction of state legislation. It would enforce the state law, unless that law authorized the appropriation of private property for purposes that were not really of a public nature. So far as authority to take the property for local public purposes was concerned, the circuit court could not enforce any other than the state law. It would respect the sovereign power of the state to define the legitimate public purposes for which private property may be taken, upon compensation to the owner being made or secured. But, at the same time, it could enforce, as of course it must, the authority of the supreme law of the land, which expressly extends the judicial power of the United States to all suits involving controversies between citizens of different states, and which also, by statute, gives the circuit courts of the United States, without qualification, jurisdiction of such controversies. A state cannot, by any statutory provisions, withdraw from the cognizance of the Federal courts a suit or judicial proceeding in

which there is such a controversy. Otherwise the purpose of the Constitution in extending the judicial power of the United States to controversies between citizens of different states would thereby be defeated. If the judiciary act of Congress admitted of the case in the county court being brought within the original cognizance of the circuit court, that is an end of the matter, although it be a case of the appropriation of private property to public uses under the authority of the state. Under any other view a state, by its own tribunals, could deprive citizens of other states of their property by condemnation, without giving them an opportunity to protect themselves, in a national court, against local prejudice and influence.

It may, however, be urged that the Delaware corporation can be fully protected by the state court in its rights of property, because, if any Federal right be denied it, the authority of this court can be invoked upon writ of error to the highest court of the state. But the question whether the property is authorized by the local statute to be condemned, as well as the question of the amount of compensation to the owner, could not come here by writ of error from the state court. Such questions would not ordinarily involve a Federal right. In the present case the commissioners reported the damages to be only \$100; whereas, the owner alleges that the amount awarded was grossly inadequate, practically confiscatory. That question, as well as the question whether the statute authorized the traction company to take the property, the Delaware corporation is constitutionally entitled, as between it and the Kentucky corporation, by reasons of the diverse citizenship of the parties, to have determined upon their merits in a court of the United States, in which, presumably, it will be protected against local prejudice or influence. The circuit court, recognizing the right of the traction company to appropriate the land in question, if necessary for its purposes, could do all that is required by the Kentucky statute, and meet fully the ends of justice. Besides, a court always looks to substance, and not to mere forms. Mere forms are not of vital consequence in cases of condemnation. *Kohl v. United States*, 91 U. S. 367, 375, 23 L. Ed. 449, 452; *United States v. Jones*, 109 U. S. 514, 519, 27 L. Ed. 1015, 1017, 3 Sup. Ct. Rep. 346.

It is suggested that the state legislature might have consummated the taking of the property of the Delaware corporation by means of a nonjudicial tribunal, and thus left open simply the question of compensation to the owner of the property taken. We do not perceive that this suggestion is at all material in the present discussion; for the state has chosen to provide for the taking by means of what is conceded to be a suit in one of its judicial tribunals. It is, in effect, conceded that the circuit court may be given jurisdiction of the question of compensation. But the contention is,

that in no case can the judicial power of the United States be invoked until the question of taking is consummated by a proceeding in the particular local tribunal designated by the state. This view, it is supposed, finds support in the cases in which it has been held that an original suit directly against a state, or a suit against an officer of the state, which, by reason of the particular relief sought, is, in effect, a suit against the state, may be limit by the state to suits brought in one of its own courts. *Smith v. Reeves*, 178 U. S. 436, 44 L. Ed. 1140, 20 Sup. Ct. Rep. 919. This illustration is wide of the mark; for the mandate of the Constitution of the United States (11th Amendment) is that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state;" whereas, the judicial power of the United States and the original jurisdiction of the circuit courts, whatever may be ordained by state legislation, extends to suits in which there is a controversy between citizens of different states. The exercise by the circuit courts of the United States of the jurisdiction thus conferred upon them is pursuant to the supreme law of the land, and will not, in any proper sense, entrench upon the dignity, authority, or autonomy of the states; for each state, by accepting the Constitution, has agreed that the courts of the United States may exert whatever judicial power can be constitutionally conferred upon them. In the exercise of that power a circuit court of the United States, sitting within the limits of a state, and having jurisdiction of the parties, is, for every practical purpose, a court of that state. Its function, under such circumstances, is to enforce the rights of parties according to the law of the state, taking care, always, as the state courts must take care, not to infringe any right secured by the Constitution and the laws of the United States. It should, however, be remarked that there is nothing in the Kentucky statute which indicates any purpose on the part of the legislature of that commonwealth to fly in the face of the above cases, or to evade the principles announced in them. It is not to be implied from the statute in question that the state intended to exclude, or supposed that it could exclude, from the Federal courts, jurisdiction of any suit to which the judicial power of the United States extended.

It was said that if the case was a removable one, the time for removal was after it was taken by appeal to the state circuit court, where it could be tried *de novo*. There is nothing in the acts of 1887, 1888, which sustains this view. Was the case, as it was in the county court, a suit in which there was a controversy between corporations of different states? If so, the right of removal was perfect under the acts of 1887, 1888. Under the Kentucky statute the condemning party was entitled, even after appeal to the circuit court, to pay into

Chicago, etc., Ry. Co. v. Crawfordsville

court the damages assessed in the county court, and, before the case was concluded in the circuit court, to take possession of the land, and oust the owner. Ky. Stat. § 839; 80 Ky. 259, 269. Clearly, the owner was not bound to wait until the proceedings in the county court were concluded, or until he was put out of possession, before exercising his right of removal, if the case was a removable one.

We hold that, as the proceeding in the county court was a suit involving a controversy between corporate citizens of different states, it was one of which the circuit court of the United States could have taken original cognizance, under the judiciary act, and it was, therefore, a removable case. And being a removable case, it is to be regarded as having been removed upon the filing of the petition and accompanying bond for removal; in which event, it was competent for the circuit court, having thus acquired jurisdiction of the subject-matter, and of the parties, to enjoin the traction company from proceeding further in the state court.

For the reasons stated, the decree of the Circuit Court awarding the injunction must be affirmed.

It is so ordered.

CHICAGO, I. & L. RY. CO. v. CITY OF CRAWFORDSVILLE.

(Supreme Court of Indiana, Jan. 5, 1905.)

[72 N. E. Rep. 1025.]

Crossings—Failure to Maintain Lights—Defenses—Ordinances Prohibiting Automatic Lights.

In an action against a railroad company for failure to light street crossings as required by a city ordinance authorized by an act of the Legislature, an answer alleging that there is a device which can be attached to the railroad track so that an approaching train at a distance will ignite a lamp at the crossing, and continue the light until the train passes, but by reason of the ordinance requiring a constant light defendant is unable to install the device, constitutes no defense.

Same—Same—Same—Ordinances—Moonlight.

Burns' Ann. St. 1901, § 5173, grants to cities the power to require railroad companies to maintain at street crossings the same kind of lights maintained by the city on all nights that the city may direct, and to provide what kind of lights shall be maintained: *held*, that an ordinance in conformity to the section is not rendered invalid for indefiniteness because it excuses lighting by the company at such times as the moon furnishes sufficient light to light such crossings and at all times when the city lights are not in operation.

Appeal from Circuit Court, Montgomery County; Jere West, Judge.

Action for penalty by the city of Crawfordsville against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

E. C. Field and H. R. Kurrie, for appellant.

F. P. Mount, for appellee.

Chicago, etc., Ry. Co. v. Crawfordsville

HADLEY, C. J. Suit by appellee to recover a penalty for the violation of a city ordinance requiring the lighting of street intersections. The act of March 4, 1893, p. 302, c. 137 (section 5173, Burns' Ann. St. 1901), grants to cities, for the security and safety of persons from running trains, the power to require, by ordinance, railroad companies to maintain, at the points where the railroad track crosses the streets of the city, the same kind of lights maintained by the city on all nights that the common council may direct, and the power to provide what kind of lights the railroad company shall maintain. The above act effects a delegation of police power to cities, and the power granted is limited and specific: (1) It can be exercised only as a means of safety to citizens against running trains; (2) the council shall determine at what particular intersections lights are necessary to safety against trains; (3) shall only require the same kind of lights maintained by the city; and (4) shall have the right to determine the nights on which the lights shall be maintained. In attempting to exercise the power granted by this statute the city of Crawfordsville, appellee, passed an ordinance, the first and second sections of which are as follows:

"Section 1. Be it ordained by the mayor and common council of the city of Crawfordsville, Indiana, that it shall hereafter be the duty of every railroad company running and operating a railroad through the city, to keep and maintain an electric light at every point where the main track of said railroad company, upon which it runs any regular train or trains during the nighttime, crosses or intersects at grade any public street in said city. Such electric light shall be of sufficient power to light the crossing of such railroad where they are placed and maintained in such a manner as to enable citizens and other persons traveling and passing over such crossing to see the track or tracks and protect themselves from the danger of running trains on such railroad; provided, such lights shall not be required to exceed in power those now in use for lighting the streets of said city.

"Sec. 2. All lights provided in section 1 hereof shall be kept lighted and burning during the hours of nighttime of every day in the year, beginning at twenty minutes after sunset and continuing to burn until twenty minutes before sunrise of each day during the months of October, November, December, January, February and March of each year, and beginning at thirty minutes after sunset and continuing until thirty minutes before sunrise of each day during the months of April, May, June, July, August and September of each year: provided, said lights shall not be required to be kept burning or lighted during any of such hours, or parts of hours, when the moon shall be shining so as to give sufficient light to light such crossing, as hereinbefore provided. And provided further, such lights shall not be required to be kept burning or lighted during any of such hours, or parts of hours

Chicago, etc., Ry. Co. v. Crawfordsville

when the lights in use for lighting the streets of said city shall not be lighted or burning. The purpose of such last provision being to exempt such railroad company or companies from lighting such crossings at any time or times when the streets of said city are not lighted."

The third section provides that for a violation of the ordinance the offending company shall pay a fine not exceeding \$100.

Appellant, having been tried and convicted of a violation of this ordinance, challenges its validity, chiefly on the ground of unreasonableness in its excessive and indefinite requirements as to the time when the lights shall be maintained. The court correctly sustained a demurrer to appellant's third answer. It was, in effect, that there is a device which can be attached to the railroad track in such way that a moving train at a distance away will ignite a lamp at the crossing, which will continue to burn and light the crossing until the train has passed over and beyond; that such device would furnish ample protection to citizens against moving trains, but, by reason of the ordinance requiring the lights to burn constantly, it is unable to install such device, and the ordinance is therefore unreasonable and void.

In the first place, when appellant has installed the device and adequately lighted the crossings during the passage of all night trains, or has been obstructed by appellee in a bona fide effort to do so, will be time enough to present such a defense.

In the second place, the Legislature has declared that the city council shall have power to determine what kind of light shall be used, and during what nights they shall be maintained. The power to require lights on all nights embraces the power to require them all hours of the night or parts of nights. This is a grant of specific power by the Legislature. Such a grant, when in harmony with the Constitution, cannot be questioned by any other body as to its reasonableness. *Champer v. City of Greencastle*, 138 Ind. 339, 35 N. E. 14, 24 L. R. A. 768, 46 Am. St. Rep. 390; 1 Dill. Mun. Corp. (4th Ed.) § 328. There is no pretense but the city of Crawfordsville maintains a system of electric lighting of its streets, and is fully within the provisions of the statute as to the right to require electricity as the kind of light to be employed by appellant. And if the counsel of appellee city has determined the kind of light appellant shall use, and it is the same kind maintained by the city, and has further provided on what nights or parts of nights the lights shall be kept burning, and has expressed its conclusions upon these things in an ordinance in clear and certain language, such provisions in the ordinance are not open to attack in a proceeding of this kind.

But it is urged, as a matter of insufficiency of the evidence, that the ordinance is void for unreasonableness in exacting a particular kind of light, and for uncertainty as to the time or

times when the company is required to have the crossing lighted. The insistence is that the duty to light depends upon so many contingencies—the going of the city lights, adequacy of moonlight, etc., as to make it impossible for appellant to determine with reasonable accuracy when the duty to light arises, and when it is excused. It is true, as contended, that, as the ordinance imposes a penalty solely as a punishment for its transgression, it must therefore be classed as penal, and subject to strict construction. Sutherland, St. Con. § 208. But it is proper to take a reasonable view of the ordinance as a whole for the purpose of ascertaining the objects the Legislature had in view. From such inspection it is plain that both the statute and the ordinance are drawn in a spirit of liberality towards the railroad companies. By the statute, unless the city is maintaining a system of street lighting, it cannot require railroad companies to light their street intersections, and it can then require only such lights as the city itself maintains. By the ordinance railroad companies may choose their own class of electric lighting, and they need be no stronger than those maintained by the city for street lighting, and when the city lights are out for any cause the companies' lights may also remain unlighted. All this legislation looks to the amelioration of the burden of railroad companies. It cannot be expected that such companies will erect their own gas, or electric light, plants to supply lights at their crossings. They are expected to use, because they can more economically use, the same kind of lights with which the city is supplied. Such utilities, whether maintained by the city or private corporation, are public, and occupy the streets and ways of a city for distribution to the people, and must, under the law, be supplied to all inhabitants fairly and alike. There is therefore no chance for oppression, and no ground for the charge of unreasonableness in being required to employ the same kind of light, or in being required to keep them burning when the city's lights are burning.

The question remains, is the ordinance before us sufficiently definite and certain, with respect to the time when the crossing shall be lighted, to inform appellant of what is commanded of it. It has been held that an ordinance prescribing that "the number of hours that said electric lights shall be required to be lighted during each period of 24 hours shall be the same as the said council does now or may hereafter require the lights of said city to be lighted" is sufficiently definite to advise the railroad of what it is required to do. Railroad Co. v. Bowling Green, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422. And we perceive no reason why it would not be sufficient for an ordinance to provide that lights shall be maintained by railroad companies in accordance with the schedule of street lighting then or thereafter maintained by the city, or why such a provision would not be preferable

to the moonlight provision of the ordinance before us. What, then, shall be said of this ordinance as modified by the proviso "that said lights shall not be required to be kept lighted and burning during any time when the moon shall be shining, so as to give sufficient light to light such crossing, as hereinbefore provided;" that is, as provided in section 1, when the moon is shining so as to give sufficient light to enable travelers over the crossing to see the track, and protect themselves from running trains. When the ordinance and its provisions are considered as an entirety, what does it all mean? Simply this: Railroads shall maintain during all and every night in the year some pattern of electric light at all crossings over which trains run in the nighttime. The lights should be sufficient to enable the traveler to see the crossing, but need not be of a greater power than the lights in use by the city for street lighting. The lighting is excused on all nights and parts of nights (1) when the moon furnishes the traveler the same amount or strength of light required of the company by the first section of the ordinance, namely, not exceeding in power the lights in use by the city; and (2) at all times when the city lights, for any reason, are not going. The exemptions are beneficial to appellant. The city had, under the statute, the undoubted authority to require all-night lighting in a proper case, and the fact that it exonerated the company from lighting, under certain conditions, was a matter of grace, and not of duty. Appellant is not, therefore, in a situation to complain of unreasonableness in the concessions because too vague and uncertain. When there is not reasonable certainty as to the sufficiency of the moonlight, the lighting should go on if the city lights are burning. We therefore conclude that the ordinance was sufficiently definite and certain to inform appellant of what it was required to do.

The expressions and rulings in the city of Shelbyville v. C., C. & St. L. Ry. Co., 146 Ind. 66, 44 N. E. 929, and C., C. & St. L. Ry. Co. v. City of Connersville, 147 Ind. 277, 46 N. E. 579, 37 L. R. A. 175, 62 Am. St. Rep. 418, which announce a contrary doctrine, are modified to conform to the rulings in this case.

Judgment affirmed.

BUDD et al. v. CAMDEN HORSE R. CO. et al.

(Court of Errors and Appeals of New Jersey, Nov. 14, 1904.)

[59 Atl. Rep. 229.]

Street Railroads—Additional Servitude—Ejectment.*

A double-track street railway was constructed in the northerly half of a road 33 feet in width, pursuant to a city ordinance. The

*As to whether a street railway is an additional servitude, see footnote appended to *Younkin v. Milwaukee, L. H. & T. Co. (Wis.)*, 10 R. R. R. 193, 33 Am. & Eng. R. Cas., N. S., 193.

Budd v. Camden Horse R. Co

poles carrying electric wires were close to the outer line of the street on which the plaintiffs' land abutted, and the ties extended to within two or three feet of that line. No sidewalk had been built: *held*, that the construction of the railway did not constitute an additional servitude, and that the abutting owners—owners of the soil of the highway—could not maintain ejectment against the railway company. (Syllabus by the Court.)

Error to Supreme Court.

Action by Hiram E. Budd and Isaac W. Budd against the Camden Horse Railroad Company and the Camden & Suburban Railway Company. Judgment for defendants, and plaintiffs bring error. Affirmed.

Francis D. Weaver and John W. Wescott, for plaintiffs in error.

E. A. Armstrong, for defendants in error.

SWAYZE, J. This is an action of ejectment to recover possession of land 16½ feet in width and 1,427 feet in length, bounded by the center and northerly lines of Ferry Road, in the city of Camden. Upon this land, and within the bounds of the highway, the defendants have constructed a double-track street railway, and have located poles carrying wires, through which electric power is transmitted. The fee is in the plaintiffs, subject to the easement for a street. The tracks and poles are located in pursuance of and in conformity with the city ordinance, and are entirely within the highway. No sidewalk has been constructed at this point. The plaintiffs' substantial complaint is that the ties and poles are so close to the northerly line of the street, called the "building line," that they will interfere with the erection of buildings, make it impossible to have steps in front, or to maintain a sidewalk, and compel gates and doors to be so constructed as to swing inward; that the construction of the tracks in so narrow a space makes common travel dangerous, and will compel occupants of houses, if any are hereafter erected, to exercise extraordinary caution in getting in and out of their homes. In view of these facts the plaintiffs urged at the trial that the defendants' tracks amounted to an additional servitude not within the recognized public easement. The trial judge held adversely to this view, and directed a verdict for the defendants.

Although ejectment may be maintained by the owner of the soil in a public highway against one who attempts to appropriate it to a purpose not within the limits of the public easement, it is now settled that the action cannot be maintained against a public corporation occupying the street within the limits of the public right; nor against the agencies through which the public corporation exercises its rights. *French v. Robb*, 67 N. J. Law, 260, 263, 51 Atl. 509, 57 L. R. A. 956, 91 Am. St. Rep. 433. It is also settled that the substitution of electric motors with the trolley system, including poles set within the curb line, for horses on street railroads,

does not per se create an additional easement. *Roebling v. Trenton Passenger Railway Company*, 58 N. J. Law, 666, 673, 34 Atl. 1090, 33 L. R. A. 129; *Montclair Military Academy v. North Jersey Street Railway*, 70 N. J. Law, 229, 57 Atl. 1050. The opinion of the *Roebling Case* contained an intimation that it must not be construed so as to allow the railway company to place the track so near the curb line as to interfere unreasonably with the owner's access to his property, or with the enjoyment of the privileges which owners of abutting lands are entitled to enjoy in a public highway in front of their premises. The question now presented is whether the defendants' tracks are so constructed and their poles so located as to interfere unreasonably with the owner's access to his property. The construction of the tracks does not seem to prevent access to the land in its present condition, or for any purpose for which land without buildings may be used. It is true that the legitimate use of the street for access to the land may cause great inconvenience to the defendants in the operation of their road by interrupting the passage of cars, but, as was said in *Kennelly v. Jersey City*, 57 N. J. Law, 293, 295, 30 Atl. 531, 26 L. R. A. 281, "the private right will not on that account be diminished; the public using the tracks must put up with the interruption." The location of the poles and the ties at or near the northerly limit of the street may, indeed, prevent the future construction of a sidewalk of the width ordinarily required by the ordinances of Camden; but this is a matter of purely municipal regulation, and the ordinance of 1886, even if otherwise applicable to the present case, cannot be applicable if the latter ordinance of 1896 has made the building of such a sidewalk impossible. The ordinance of 1886 seems, however, to be applicable only to streets 30 feet in width in the city of Camden, and in the present case the center line of Ferry Road is the boundary line of the city, so that only the northerly 16½ feet is within the city limits. That the ordinance was intended to apply only to streets wholly within the city is indicated by the fact that it undertakes to provide for sidewalks on each side of the street, and makes no provision for sidewalk on one side only. We cannot agree with the plaintiffs' contention that the ordinance of 1886 gave them a vested right to have a sidewalk 7½ feet wide. The danger arising from the operation of cars by electricity in the street is, like the injury by vibration in the *Roebling Case*, one of those injurious consequences which result from the legitimate and proper use to which public thoroughfares are devoted. It is not unlike the danger arising from increased traffic in the streets by an increasing population.

It is contended by the plaintiffs that they suffer a special injury, because, if fences are built, the gates must swing inward, and not outward; if houses are built, the doors must swing inward, and no steps can be placed within the lines of

Wisconsin & M. Ry. Co. v. McKenna

the street. No doubt it is a common practice to build gates, and perhaps doors, so as to swing outward, and to build stoops within the street line; but there can be no right in the abutting owner to interfere, even to this extent, with the public easement in the street, if the municipal authorities choose to adopt regulations which expressly or by necessary implication prevent such an interference. The public right to use the street and to have it unobstructed is superior to the landowner's right to obstruct it even by swinging gates and doors and stoops. Such obstructions are peculiar privileges usually afforded to the owner of the land in the use of the adjacent sidewalk (*Weller v. McCormick*, 47 N. J. Law, 397, 400, 1 Atl. 516, 54 Am. Rep. 175), but are not his as matter of legal right. The public right is paramount. *Id.*, 51 N. J. Law., 470, 472, 19 Atl. 1101, 8 L. R. A. 798. It is not necessary in the present case to decide what the abutting owner's rights would be if there was an existing sidewalk. In that respect the case is like *West Jersey Railroad Co. v. Camden, Gloucester & Woodbury Railway Co.*, 52 N. J. Eq. 31, 29 Atl. 423. Upon the whole case we fail to find such unreasonable user of the highway as would amount to an additional servitude.

The judgment must therefore be affirmed.

WISCONSIN & M. RY. CO. *v.* McKENNA et al.

(Supreme Court of Michigan, Feb. 4, 1905.)

[102 N. W. Rep. 281.]

Contract for Sale of Land—Delivery of Deed.

Where some of the grantors in a contract for the sale of land executed a deed and delivered it to the common agent of the grantors and grantee on an understanding that it was not to be delivered to the grantee without the signature of the remaining grantor, and that the consideration was not to be paid until such signature was obtained, there was no delivery of the deed to the grantee.

Same—Specific Performance—Statute of Frauds.

Where a deed was executed by some of the grantors under an oral executory contract to convey the land, and delivered to the common agent of the parties, on an understanding that he should procure the signature of the remaining grantor, who was to receive no consideration, and the consideration then be paid to the others, but the remaining grantor refused to execute the deed, whereupon the grantee tendered the consideration to the others, waiving the signature of the grantor who refused to execute, the tender did not render the executory contract within the statute of frauds a valid one, so as to support a suit for specific performance by the grantee.

Same—Statute of Frauds—Entry on Lands by Railroad—Specific Performance.

Where a contract between a railroad and a landowner for a conveyance of the land to the railroad was executory and within the statute of frauds, the mere entry on the land by the railroad, with the consent of the owner, and excavation of a small quantity of earth, was not sufficient to warrant specific performance at the suit of the vendee.

Appeal from Circuit Court, Dickinson County, in Chancery; John W. Stone, Judge.

Suit by the Wisconsin & Michigan Railway Company against Mary T. McKenna and others. From a decree in favor of defendants, complainant appeals. Affirmed.

Argued before MOORE, C. J., and McALVAY, GRANT, BLAIR, and HOOKER, JJ.

L. D. Eastman (E. Clark Eastman, of counsel), for appellant.

F. D. Mead, for appellees.

HOOKER, J. Thomas McKenna was the owner in fee of the premises in question, subject to the rights of Mary McKenna (his wife), and John K. Stack, who were owners, respectively, of 21-24 and 3-24 of the ores and minerals upon said premises, with the right to enter, mine, and carry away the same. The complainant, a railroad company, sought to acquire a right of way over said lands for its track, and to that end began proceedings for condemnation under the statute. At the time the cause came on for hearing before the circuit court, negotiations for a settlement were pending, and it was announced by counsel that an amicable adjustment of the matter was probable. The negotiations were continued until July 14, 1903, when, all the parties except Stack being present, and he being represented by counsel, an agreement was made and reduced to writing by the terms of which a deed of the right of way to the defendant was made in consideration of \$2,500, which was to be paid for the same. Mrs. McKenna was to receive the entire sum and Stack nothing. The writing was executed by the McKennas, and was placed in the hands of Fr. Flannigan, their counsel, whose clerk was to take it to Mr. Stack, to be signed by him, and on its return Mr. Flannigan was to deliver it to the complainant, and to deliver to Mrs. McKenna the complainant's check for \$2,500, which, in pursuance of the agreement, it deposited with him for the payment of the consideration. The clerk was to be paid for his service by the appellant. There was no doubt in the minds of any of the parties that Stack would sign the paper, and, the check being deposited, it was orally agreed that the complainant might enter on the premises and begin work at once. It accordingly entered, and did a small amount of work, before learning of the refusal of Stack to sign and the repudiation of the contract by Mrs. McKenna, who drove the men from their work with a pistol. Stack refused to sign for some reason not given, and, the money not being paid to Mrs. McKenna, who demanded it, she repudiated the agreement, and concluded to double her price for the right of way, and so informed the complainant. After this refusal and Mrs. McKenna's repudiation of the agreement, the complainant offered to waive the signature of

Stack, and to take the deed, and pay over the price to the McKennas without it, claiming the right to do so, but this was refused. It has filed the bill in this cause for specific performance, and an injunction which was issued has been continued to the hearing of the cause upon the filing of a bond conditioned to prosecute the condemnation proceedings to conclusion, and pay the compensation that should be therein awarded if its bill should be dismissed. The circuit court determined that the complainant had not acquired title to the right of way, and denied specific performance, but continued the injunction for a time, to give opportunity for condemnation, in case the Supreme Court should affirm the decree. The complainant has appealed.

The parties made an oral contract for the sale of this right of way, and the defendant went into possession under it, and deposited the consideration with Mr. Flannigan, the attorney of the McKennas, who was selected for the purpose. The deed which was to convey the right of way was never fully executed by the grantors named in it as contemplated by all, for the reason that Stack refused to sign it. We are of the opinion that there was no delivery of the deed to the complainant by the McKennas, who signed it, as Flannigan had no authority to deliver it without the signature of Stack, or to deliver the check to the McKennas without such signature to the deed, until it was given by letter after this suit was commenced. The situation, then, is that the parties made an oral executory contract for the sale of an interest in land. It was, when made, within the statute of frauds, and cannot be enforced specifically unless it has been taken out of the statute by part performance. The only thing that has been done by the complainant was to take possession in expectation of performance, and expend a small sum upon the land, and to make a deposit with a common agent of the consideration. The defendants have done nothing toward executing the contract except to yield possession in the expectation that a deed would be made, which, owing to Stack's refusal, was not completed. In other words, the contract was not executed because the consideration has not been paid or the deed delivered. It remains an executory contract within the statute of frauds, because not in writing. The only question left is whether equity may treat the possession given as such part performance as to justify specific performance. It is said the offer to deliver the check was a waiver of complainant's claim to Stack's signature as a condition precedent to the delivery of the deed, but that does not make the executory contract valid. The contract being executory and oral, neither party could compel the other to perform. The tender of a deed would not make it valid, nor would the tender of the consideration; and neither, unless accepted, would be available in support of a claim of part performance. Hence we must

Mordhurst v. Ft. Wayne & S. W. Traction Co

say that the direction to Flannigan, the common agent, to deliver the check to Mrs. McKenna, even if she were informed of it, did not affect her right to refuse performance, and, if the complainant is to prevail, it must be upon the ground that the change of possession entitles it to specific performance. The mere putting a vendee in possession is not sufficient to give a right to specific performance. It is not equities arising out of the contract, but equities based upon what has been done by way of executing it, and in reliance upon it by the acquiescence of the other party, that courts of equity act upon in such cases; and, as indicated by the learned circuit judge, there is little beyond the mere fact of the entry by the complainant shown. The possible excavation of a little dirt, involving at most the expenditure of a few dollars, is the extent of the injury to the complainant, and even that will not be lost if it shall succeed in obtaining the right of way in the proceedings for condemnation, which we understand to be yet pending.

The decree will be affirmed, with costs.

MORDHURST v. FT. WAYNE & S. W. TRACTION CO.

(Supreme Court of Indiana, July 1, 1904.)

[71 N. E. Rep. 642.]

Street Railways—Performance of Contract with City—Presumption.

It will not be presumed that a street railway company will violate its contract with the city, and an allegation in a complaint that it intends to do so, in advance of any act of the company constituting such violation, will not prevail against the presumption of good faith.

Same—Use of Streets—Injunction—Rights of Abutters.

An abutting property owner is not entitled to an injunction against the construction of a street railroad if the use of the streets by the railroad in the manner proposed, and upon the conditions set forth in the contract between the railroad and the city, do not create an additional burden upon the street, and a deprivation of the property owner's beneficial interest therein. The mere anticipation of breaches by the railroad of its contract with the city, and of consequent injuries to the abutting owner's property, will not entitle him to such an injunction.

Same—Same—Same—Carriage of Freight.

The carriage of light express matter, passenger's baggage, and mail matter upon street cars does not constitute a ground of complaint on the part of abutting lot owners.

Same—Same—Additional Servitude—Compensation.*

A street railroad is not an additional burden upon the street, and the owners of abutting real estate are not entitled to compensation on account of the appropriation and use of the street by such a road.

Railroads in Streets—Additional Servitude—Compensation.

A railroad cannot construct a common passenger and freight railroad upon the streets of a city, in the absence of a license from the abutting lot owners, without compensation first assessed and paid or tendered.

*As to whether a street railway is an additional servitude, see footnote appended to *Younkin v. Milwaukee, L., H. & T. Co. (Wis.)*, 10 R. R. 193, 33 Am. & Eng. R. Cas., N. S., 193.

Mordhurst v. Ft. Wayne & S. W. Traction Co**Streets—Purposes of Dedication.**

A street, platted or otherwise laid out in a city forms a part of the highway system of the state, and becomes dedicated to the use of the public for all public purposes, present and prospective, consistent with its character as a public highway, and not actually detrimental to the abutting real estate; and it is not exclusively dedicated to the use of abutting property, or the convenience or profit of any or all of the inhabitants of the particular municipality in which it is situated.

Interurban Electric Railway—Carriage of Freight—Additional Servitude.

The construction and operation of an interurban electric railroad to carry passengers, their baggage, light express matter, and mail, in trains consisting of one, or, by special permission of the board of public works, of two cars, of the best and most approved pattern, is not an additional servitude upon the street for which the abutting property owners are entitled to compensation.

Electric Railway—Injury to Abutting Property—Damages.†

An electric railroad is liable in an action for damages to an abutting property owner for any special injury to his property occasioned by the negligence of the railroad in constructing or operating its road.

Appeal from Circuit Court, Allen County; Edward O'Rourke, Judge.

Action by Henry W. Mordhurst against the Ft. Wayne & Southwestern Traction Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Barrett & Morris, for appellant.

Olds & Doughman, for appellee.

DOWLING, J. This suit was brought by the appellant against the appellee to enjoin the latter from constructing and operating an interurban railway over that part of Fulton street, in the city of Ft. Wayne, upon which a lot owned by appellant abuts, no compensation for such appropriation and use of appellant's interest in the land so appropriated having been assessed and tendered. A demurrer to the complaint for want of sufficient facts was sustained, and, upon the refusal of the plaintiff below to plead further, judgment was rendered upon the demurrer. From this judgment the plaintiff appeals, and he assigns the ruling on the demurrer for error.

Greatly condensed, the material facts stated in the complaint are these: The plaintiff is, and for several years has been, the owner in fee simple of lot No. 6, in block 23, in Ewing's Addition to the city of Ft. Wayne. On said lot there are four large and expensive houses fronting on Fulton street, used as residences. Said lot No. 6 abuts upon the east line of said street for a distance of 150 feet, and the

†As to what are the elements of damages to private property from the construction and operation of railroads in streets, see foot-note appended to *South Bound R. R. v. Burton* (S. Car.), 10 R. R. R. 147, 33 Am. & Eng. R. Cas., N. S., 147, where all the preceding authorities in this series are collected; foot-note appended to *Stockdale v. Rio Grande Western Ry. Co.* (Utah), 12 R. R. R. 527, 35 Am. & Eng. R. Cas., N. S., 527.

plaintiff, as such abutting owner, has title to all that part of said street opposite to his said lot to the center line of said street, subject only to the public easement therein for the usual and ordinary purpose of a street. The defendant is an interurban railway company, organized under the laws of this state for the purpose of constructing and operating an interurban railroad system in said city of Ft. Wayne and its vicinity, and from thence to the cities of Huntington and Wabash, and such other cities and counties in this state as the defendant may select, and to connect at such cities and counties with other railroads in this and other states. Said line is already constructed from the city of Ft. Wayne to the city of Huntington, and is being operated by the defendant. The extension of said line from the city of Huntington to the city of Wabash is now being built, and is nearly completed, and the defendant intends to extend its railroad to other cities and counties in this state. By the law of this state the defendant is authorized to transport persons and all kinds of property on its cars along the streets of the cities in which its railroad is constructed by such force and power as such cities may permit, to receive tolls and compensation for such service, and, if necessary, to acquire real estate for the use of such company by appropriation and condemnation. The city of Ft. Wayne, by its board of public works, on December 13, 1900, granted to George Townsend, William S. Reed, and Charles C. Miller, and to their successors and assigns, permission to lay a single track for an interurban street passenger railway line, with the right to haul express matter, mail, and passenger baggage in connection therewith, to be operated by electricity or other improved power, to be approved by said board of public works, with all proper and necessary turnouts, wire poles, etc., in and upon said Fulton street and other streets of said city of Ft. Wayne, and over that part of said Fulton street on which plaintiff's lot abuts. Said railway is to be constructed from the city of Ft. Wayne to the city of Huntington, a distance of 25 miles. By the terms of the said grant from the city of Ft. Wayne the motive power is at all times to be ample and of the approved kind; the cars are to be of the best pattern. They are to be kept clean, well ventilated, seated, heated, and lighted. They are to be kept painted and decorated outside and inside so as to present an attractive appearance. They are to be designated as express and passenger cars. The express cars are to be used exclusively for light express matter, passengers' baggage, and United States mail matter. The passenger cars are to be used for hauling passengers and baggage, light express matter, and United States mail combined. Unless expressly authorized by the board of public works, no train of more than one car shall be run over said line, but said board, upon the petition of the said company, may permit two cars

Mordhurst v. Ft. Wayne & S. W. Traction Co

to be run. The said company is required to permit other interurban or suburban companies, empowered by the common council or board of public works of the city of Ft. Wayne to use the streets of that city for the transportation of passengers, express, and United States mail, to use its tracks, etc. The contract between the board of public works of said city of Ft. Wayne and the said Townsend, Reed, and Miller was assigned to the defendant, but such assignment was not reported to or approved by said board. The defendant is claiming that it is not prohibited by its agreement with the city, nor by any ordinance of said city, from carrying freight or any kind of property on its railroad through said streets. Plaintiff has never consented to the use or appropriation of said Fulton street in front of his premises by said defendant. No attempt has been made to obtain his consent to such appropriation and use. No condemnation proceedings have been taken by the defendant to acquire any rights in said street, and no damages have been tendered to the plaintiff for such appropriation of said street in front of his said lot. The defendant threatens to enter upon the plaintiff's premises on said street, and to construct its said railroad, to lay down T rails, such as are used by steam railroads, to erect poles, string wires, etc., and to maintain the same on said street and on plaintiff's said premises. Said railroad will not facilitate or aid the usual traffic on said street, but is intended to and will gather up a large amount of heavy freight and traffic for different parts of the country in cars constructed and intended only to carry such freight, which will be carried by the defendant along said Fulton street, and over plaintiff's said premises, in heavy cars and trains, at all hours of the day and night, which, in the absence of said railroad, would never be carried along said street, and said defendant will thereby prevent and destroy the usual and ordinary travel and traffic on said street. The construction and operation of said railroad by the defendant will create great and unusual noises and dust, which will be carried by the winds into plaintiff's said residences. They will shake and jar said dwelling houses so as to make them unfit for the purposes for which they were designed. They will seriously impede and endanger ingress to and egress from plaintiff's said premises, and diminish their value to the extent of \$10,000. The appropriation and use of the street by the defendant will be a continual nuisance, and will damage said premises as aforesaid. The complaint concludes with a prayer that the defendant be enjoined from excavating said street, constructing a railroad thereon, and from operating and using the same for the transportation of freight, merchandise, express or mail matter on the cars of the defendant along said Fulton street over plaintiff's premises, and for damages in the sum of \$10,000.

The board of public works of the city of Ft. Wayne was

empowered by the statute under which that city was incorporated to prescribe the terms and conditions upon which any railroad company should use the streets of that city for the construction and operation of its railroad. Section 4117, Burns' Ann. St. 1901; Acts 1893, p. 236, c. 115, § 63, amended Acts 1899, p. 138, c. 104; Dillon's Mun. Cor. (4th Ed.) § 706. Such board did enter into a contract with the defendant below, and the rights, powers, and duties of the defendant in the construction and operation of its railroad on and through the streets of the city were defined and fixed by that agreement. It will not be presumed that the railroad company will violate its contract, and an allegation of the complaint that it intends to do so, in advance of any act of the company constituting such violation, cannot prevail against the presumption of good faith and fair dealing. "The burden is on the appellant to rebut this presumption by bringing forward countervailing facts, not by pleading bare conclusions or recitals. Facts are requisite to constitute a cause of action, and they are wanting in this instance." *Lostutter v. City of Aurora*, 126 Ind. 436, 439, 26 N. E. 184, 12 L. R. A. 259. See, also, *Aurora, etc., R. Co. v. Lawrenceburg*, 56 Ind. 80; *Aurora, etc., R. Co. v. Miller*, Id. 88; *State v. Kingan*, 51 Ind. 142. To determine the sufficiency of the grounds upon which the right of the plaintiff rests, we must look to the contract between the city and the railroad company, and not to the allegations of expected violations of that agreement by the company. If the use of the streets by the defendant in the manner and upon the conditions described and set forth in the contract would not create a new and additional burden upon the street, and a deprivation of the plaintiff's beneficial interest therein, then he is not entitled to an injunction against the construction of the railroad. Future breaches of that contract, or violations of its terms by the company, resulting in special damage to the property of the plaintiff, may hereafter entitle him to maintain an action against the company for such injuries, but the mere anticipation of such breaches and injuries cannot authorize the court to enjoin the construction and operation of the railroad. It is important then to ascertain from the agreement itself what rights in the use of the streets, and in Fulton street among them, were granted to the railroad company, and upon what conditions the company was authorized to use these streets.

It appears from the complaint that the contract with the city authorized the railroad company to lay and maintain a single track for an interurban street passenger railway line on and along certain streets and avenues of the city, including Fulton street. The kind of rail to be laid was not specified, and a T rail, such as is used by steam and other railroads, may be adopted. The company was also granted the privilege of constructing, erecting, and maintaining in connection with

Mordhurst v. Ft. Wayne & S. W. Traction Co

its said railroad all necessary turnouts, switches, feed wires, and poles. The road is to be operated by electricity, and the power is at all times to be ample, and of the approved kind. The cars are to be of the best pattern, with all usual conveniences for the comfort of passengers. They are to be painted and decorated on the outside, and are always to be kept in repair and made attractive in appearance. They are to be designated as express and passenger cars. The former are to be used exclusively for hauling light express matter, passenger baggage, and United States mail. The latter are to be used exclusively for the transportation of passengers and baggage, light express matter, and United States mail combined. No train consisting of more than one car is to be run over said railroad, except that upon petition of the company the board of public works may authorize the running of a train of two cars. Will the construction and operation of such a railroad in the manner prescribed, and subject to the conditions and requirements we have set out, infringe upon the rights of the plaintiff in Fulton street opposite his property, and will it, if so constructed and operated, deprive him of any beneficial interest in the street to which he is entitled? The question is a very practical one, and is to be determined by the facts of the case, and not upon any mere theory or fiction of law. If constructed and operated in the manner described, in what essential particular will the defendant's railroad differ from an ordinary electric street railroad? Both kinds of roads, when deemed necessary, use the T rail, and their cars are propelled by the same motive power. The carriage of light express matter, passenger baggage, and mail matter upon street cars would not constitute ground of complaint on the part of abutting lot owners. If only one car is run, the street is occupied and obstructed by it to no greater extent than it would be by a street car. If two constitute a train, they will take up no more space and do no more injury than a motor car and trailer, which are commonly run upon street railroad tracks when the business of the company requires such additional car. The fact that light express matter, passenger baggage, and United States mail matter are carried on a car does not affect the property owner, nor injure his property. The transportation of articles of this kind does not create any resemblance between the interurban electric railroad and a steam railroad carrying ordinary goods and merchandise, and results in none of the annoyances and injuries which are caused by either passenger or freight trains on such a railroad. Trains on steam railroads are drawn by locomotives of enormous size and weight, which constantly emit smoke, sparks, cinders, and steam, and which drop coals of fire from their fire boxes. Their passenger trains usually consist of an express and baggage car, and from one to many large and heavy passenger coaches. Freight trains, as commonly made up, contain from 1 to 25 or 30 large,

Mordhurst v. Ft. Wayne & S. W. Traction Co

roughly constructed cars for the transportation of coal, stone, iron, coal oil in tanks, lumber, live stock, and other heavy merchandise of every description. Such trains, so propelled, unavoidably fill the atmosphere in their vicinity with dust, smoke, and steam, make much noise when running, stopping, and starting, seriously obstruct the streets and street crossings, and for considerable periods every day to a great extent exclude other travel and traffic from the streets on which they are moved. A fair comparison of the incidents and consequences attending the running of a single interurban electric car carrying passengers and baggage, light express matter, and United States mail matter over the streets of a city, or resulting therefrom, with the real and substantial annoyance, inconvenience, danger, and injury to property attending the operation of passenger and freight trains on steam railroads, will demonstrate that most, if not all, the ills and injuries anticipated from the former are imaginary, or at least greatly exaggerated.

The defendant is authorized, by its agreement with the city of Ft. Wayne, to run a single electric car over its tracks in that city, and to carry on such car passengers and the articles specified in the agreement. Upon petition, the use of two cars in a train may be permitted. On the narrow basis of these facts the plaintiff alleges that the proposed interurban railroad will gather up a large amount of heavy freight and traffic from different parts of the country; that it will use heavy freight cars and trains at all hours of the day and night; that it will prevent and destroy the ordinary travel and traffic on Fulton street; that it will create great and unusual noises and dust, which will be carried into plaintiff's residences; that it will shake and jar said dwelling houses so as to render them unfit for use; and that it will seriously impede and endanger ingress to and egress from the said dwellings. The premises entirely fail to support the conclusions drawn from them.

It will be seen that the plaintiff was not content to rest his case upon the proposition that the defendant could not acquire the right to construct and use the street on which plaintiff's lots abut for the purposes of an interurban street railroad without the consent of the plaintiff, or compensation first assessed and tendered or paid, but he attempts to set forth reasons why such privilege should not be granted by the city or exercised by the defendant. It is apparent that every objection founded upon injury to his property rights which the plaintiff can justly urge against the use by the defendant of Fulton street in front of plaintiff's lots would apply with equal force to the use of that thoroughfare by an electric street railroad constructed and operated wholly within the city limits. But this court has held that such a street railroad is not an additional burden upon the street, and that the owners of abutting real estate are not entitled to compensa-

Mordhurst v. Ft. Wayne & S. W. Traction Co

tion on account of such appropriation and use. *Eichels v. The Evansville Street Ry. Co.*, 78 Ind. 261, 41 Am. Rep. 561; *Chicago, etc., Ry. Co. v. Whiting, etc., Ry. Co.*, 139 Ind. 297, 303, 304, 38 N. W. 604, 26 L. R. A. 337, 47 Am. St. Rep. 264; *Brown v. Duplessis*, 14 La. Ann. 842; *Nichols v. Ann Arbor, etc., Co.*, 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; *Newell v. Minneapolis*, 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303; *Montgomery v. Santa Ana R. Co.*, 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89; *Rafferty v. Central Traction Co.*, 147 Pa. 579, 23 Atl. 884, 30 Am. St. Rep. 763; *People v. Ft. Wayne, etc., Co.*, 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752.

It is equally well settled on the other hand that a railroad corporation cannot construct a common passenger and freight railroad upon the streets of a city, in the absence of a license from the abutting lot owners, without compensation first assessed and paid or tendered. *Tate v. Ohio, etc., R. Co.*, 7 Ind. 479; *Cox v. Louisville, etc., R. Co.*, 48 Ind. 178; *Terre Haute, etc., R. Co. v. Rhodel*, 89 Ind. 128, 46 Am. Rep. 164; *Inhabitants of Springfield v. Connecticut River Co.*, 4 Cush. 63. This distinction does not rest upon a difference in name—one being denominated a street railroad or a passenger railroad, and the other a commercial or freight railroad—nor upon the motive power employed, nor upon the kind of rail used, nor upon the length of the railroad. It results from the nature of the business done by each of the two kinds of railroads, and the physical agencies and manner by which and in which that business is carried on. Those of the one are consistent with the use of the street by the lot owner and the general public, and, if not directly beneficial to the abutting real estate, are not detrimental to it. They relieve the streets from some of the burdens of travel upon it, they facilitate travel between different parts of the city, and they enhance the value of abutting property by increasing the convenience of access to it. The business of the other class of railroads, and the means by which it is necessarily carried on, require the service of entirely dissimilar agencies and methods. Great trains of cars moving along the streets or standing upon them are real and serious obstructions to all other uses of the highway. Such trains make a loud noise by day and by night, and disturb the quiet of neighborhoods. Access to abutting property is rendered difficult and dangerous, and the jarring and shaking of buildings is annoying to the occupants, and often injurious to the structures themselves. If the cars are propelled by steam, then there is the additional inconvenience of smoke, cinders, sparks, the blowing off of steam, the ringing of the engine bell, and the whistling of the locomotive. There are good and substantial reasons why compensation should be paid to the owners of abutting lots when a street in a city is used for such a purpose and in such a manner.

If, then, the injuries or inconveniences sustained by the owner of lots abutting on a street on which an interurban electric railroad is constructed are neither different from those resulting from the construction and operation of an ordinary street electric railroad, nor greater in degree, and if the latter is held not to be an additional burden upon the street entitling abutting lot owners to compensation, upon what ground can it be asserted that the proposed interurban railroad is such an additional burden as requires compensation to be assessed and paid or tendered to the owners of abutting lots before the street can be lawfully appropriated and used for the purposes of such a railroad? The only basis for a claim for compensation is the circumstance that the interurban railroad is intended for the transportation of persons, baggage, light express matter, and United States mail matter to places outside the city of Ft. Wayne, and at greater or less distances therefrom. The reason given in support of this claim is that, while the interurban railroad is, to some extent at least, a new and additional servitude, it is of no local benefit to the abutting property, that it does not aid in carrying forward the local travel or assist in the work of transportation for which the street was designed, and that the passengers and goods carried by it would not, in its absence, have been brought upon the street at all. It is contended that this is a use of the street not contemplated by the landowners who laid out or dedicated the highway. A street platted or otherwise laid out in a city or town of this state is thereby dedicated to the use of the public, and not exclusively to the use of abutting property, or to the convenience or profit of any or all of the inhabitants of the particular municipality. It forms a part of the great system of highways of the state, and its use for intercommunication with other neighborhoods, towns, and cities is one of its most important purposes. In many respects it is governed by the general laws regulating public ways. Discriminations in the terms and conditions on which it could be used in favor of the abutting lot owners, the residents on the particular street, or the inhabitants of the city, and against nonresidents, could not be tolerated. The dedication of a street must be presumed to have been made, not for such purposes and usages only as were known to the landowner and platter at the time of such dedication, but for all public purposes, present and prospective, consistent with its character as a public highway, and not actually detrimental to the abutting real estate. *Cater v. Northwestern, etc., Co.*, 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310, 51 Am. St. Rep. 543; *Cooley*, Const. Lim. 556; *Elliott, Roads and Streets*, p. 529. The convenience and advantage of all the inhabitants of the city and of the public at large must be regarded as the objects contemplated when the street was laid out or opened. A narrower construction would require a sacrifice of the greater

Mordhurst v. Ft. Wayne & S. W. Traction Co

interests of the community and the public to the inferior and subordinate claims of the local lot owner and abutter. Such a construction of the law governing the dedication of public streets and the reserved rights of the original landowner and his assigns in the street by unreasonably increasing the cost of rights of way or use would obstruct all progress, and deprive the local community of the benefit to be derived from the advancements of science, invention, and discovery. It would isolate the community, to some degree, at least, from surrounding neighborhoods, towns, and cities, and subject it to many serious inconveniences and privations. This principle has been recognized by this court, and the question can no longer be considered an open one in this state. *Bogue v. Bennett*, 156 Ind. 478, 482-486, 60 N. E. 143, 83 Am. St. Rep. 212; *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. Rep. 358; *Lostutter v. City of Aurora*, 126 Ind. 436, 26 N. E. 184, 42 L. R. A. 259; *Eichels v. Evansville St. Ry. Co.*, 78 Ind. 261, 41 Am. Rep. 561; *Coburn v. New Telephone Co.*, 156 Ind. 90, 59 N. E. 324; *Chicago, etc., Ry. Co. v. Whiting St. Ry. Co.*, 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, 47 Am. St. Rep. 264; same case, 151 Ind. 577, 46 N. E. 999. Rapid and cheap transportation of passengers, light express and mail matter, between neighboring towns and cities may be quite as necessary and as largely conducive to the general welfare of the places so connected and their inhabitants as the like conveniences within the town or city. Where such transportation is furnished by an interurban electric railroad operated under the conditions and restrictions contained in the agreement between the appellee and the city of Ft. Wayne, we do not think the construction and operation of such a railroad in such a manner constitutes an additional servitude upon the street which entitles abutting property owners to compensation. For any actual and special damage sustained by the abutting lot owner by reason of the construction of the appellee's railroad, or resulting from its use, the lot owner has his remedy by an action at law. *Dillon's Mun. Cor.* (4th Ed.) § 712, note 1. The railroad company will be liable to the abutting lot owner for any special injury to his property occasioned by the negligence of the company in constructing its railroad or in operating it. Nothing that we have said in this opinion is to be understood as denying or in any degree abridging that right. *White v. Chicago, etc., R. Co.*, 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257; *Jeffersonville, etc., R. Co. v. Esterle*, 13 Bush, 667; *Cadle v. Muscatine Western R. Co.*, 44 Iowa, 11; *Brewer v. Boston, etc., R. Co.*, 113 Mass. 52; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1; *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739; *Frith v. Dubuque*, 45 Iowa, 406.

Many decisions of courts of other states are cited by coun-

Kansas & C. P. Ry. Co. v. Burns

sel for appellant upon the main question involved in this case. All have been carefully examined and considered, but we failed to find in them sufficient reasons for adopting their conclusions. The grounds assigned are not sufficient to justify us in holding that an interurban electric railroad constructed and operated under the restrictions imposed on the appellee is such an additional servitude and burden upon the street as to require an assessment and payment of compensation to the abutting lot owner as a condition precedent to the occupancy and use of the street by the company.

The court did not err in sustaining the demurrer to the complaint. Judgment affirmed.

KANSAS & C. P. RY. CO. *v.* BURNS et al.

(Supreme Court of Kansas, Jan. 7, 1905.)

[79 Pac. Rep. 238.]

Ejectment—Defenses—Railroad Right of Way.

One not the owner of the fee, and not claiming under such owner, who without right enters upon a railroad right of way, depot ground, or grounds held by a railroad company for terminal facilities, cannot justify such possession by showing that his occupancy does not interfere with the actual operation of the road by the company.

Clark A. Smith, J., dissenting.

(Syllabus by the Court.)

Error from District Court, Reno County; M. P. Simpson, Judge.

Action by the Kansas & Colorado Pacific Railway Company against E. O. Burns and others. Judgment for defendants, and plaintiff brings error. Reversed.

C. E. Benton and J. H. Richards (Prigg & Williams, of counsel), for plaintiff in error.

Geo. A. Vandever and F. L. Martin, for defendants in error.

GREENE, J. This was an action in ejectment for certain lots in the city of Hutchinson. The plaintiff relied for a recovery upon a condemnation proceeding in 1886 by the Wichita & Colorado Railway Company, in which the lots in question and other lands were condemned for a right of way, depot grounds, and terminal facilities for said company. Plaintiff succeeded to all the rights of the Wichita & Colorado Railway Company. The defendants claim title and right of possession under a tax deed regular on its face, and the erection of lasting and valuable improvements. Defendants also contend that the company was not actually using the lots for railroad purposes, and their occupancy did not interfere with the company's use of such of its property as was in actual use by it.

It was admitted that the right of way of plaintiff through the city of Hutchinson had been duly and regularly assessed by the board of railroad assessors of the state of Kansas for the year 1886, and for each and every year thereafter, and that the taxes so assessed for 1886 and for each subsequent year had been paid by said company. It is also admitted that the condemnation proceeding by the Wichita & Colorado Railway Company was regular, and that the plaintiff had regularly succeeded to all the rights of such company. In view of these admissions, the sale made by the county in 1896 for the taxes of 1895 was unauthorized, and conveyed no title to the purchaser. Possession under a tax deed so acquired cannot be made a defense to an action in ejectment. It appears from the record that the court, in rendering judgment, adopted defendants' theory that they might remain in the actual possession of the lots in question, or any portion thereof, so long as they did not actually interfere with the operation of the railroad by the company. This is apparent from the judgment, in which we find the following recital: "The court, having heard all the evidence in the case, and being fully advised therein, doth find that there is involved in this controversy a sum over and above the sum of \$100 (one hundred dollars). The court also finds that the occupancy of the defendants of the real estate in question does not interfere with the possession of the plaintiff. The court also finds for the defendants." At the time the condemnation proceeding took place, one Miller was the owner of the fee in this property; and, so far as the record shows, he is still such owner. The defendants do not claim through him. Indeed, except for their tax deed, they had no claim of title except that which arises by implication of law from possession. As between a railroad company and one not the owner of the fee, and not claiming under such fee owner, a railroad company is entitled to the exclusive possession of all property condemned to its use for railroad purposes. The right acquired by a railroad company by condemnation proceeding for right of way, depot grounds, and terminal facilities dominates all right of possession, except as to the owner of the fee; and he may use only that portion which is not in immediate use by the company, and not necessary in the safe and convenient use of that which is an actual service. *Dillon v. Railroad Co.*, 67 Kan. 687, 74 Pac. 251, and cases cited; *A. T. & S. F. Ry. Co. v. Spaulding* (Kan.) 77 Pac. 106, 12 R. R. R. 515, 35 Am. & Eng. R. Cas., N. S., 515, and cases cited. The whole estate and right of possession was in the fee owner and the railroad company. The defendants claimed under neither. Therefore their possession was wrongful.

For the reasons suggested, the judgment of the court below is reversed, and the cause remanded.

JOHNSTON, C. J., and W. R. SMITH, CUNNINGHAM, BURCH, and MASON, JJ., concurring.

BALDWIN TP. v. BALTIMORE & O. R. CO.

(Supreme Court of Pennsylvania, Nov. 4, 1904.)

[59 Atl. Rep. 478.]

Preliminary Injunction—Changing Location of Railroad.

A railroad company, on relocating its road, proposed to occupy a portion of a public road and close an established grade crossing, substituting a new one about 500 feet from the old, and constructing a new road between the old and the new crossing. The trial court granted a preliminary injunction to restrain the railroad from making the changes on the ground that the new road would be more dangerous than the old one: *held* erroneous, the case not being one for a preliminary injunction.

Appeal from Court of Common Pleas, Allegheny County.

Bill by Baldwin township against the Baltimore & Ohio Railroad Company. From a decree granting a preliminary injunction, defendant appeals. *Reversed.*

The following is the opinion of the court below: "The bill in this case seeks to restrain defendant railroad company from interfering at two points with a public road in plaintiff township, known as 'Streets Run Road.' The first point complained of is at Rand Station. At this point the railroad company is taking and occupying with its tracks a portion of the township road, and is relocating the road by moving it towards the creek. At this place it appears the only change, when the improvement is completed, will be the removal of the road a few feet east from its present location, and the testimony of the railroad engineers is to the effect that the road, when finished, will be fully as wide and perfect as it was before the change. The new location not being any more unfavorable than the old, the injunction heretofore granted should be modified, and to the extent that it applies to the work at this point should be dissolved. The other point of controversy is near Willock Station, the change there involving the occupying of a portion of a public road by the railroad company's tracks, the closing of an established grade crossing, the substituting of a new one about five hundred feet distant, and the construction of a new road between the old and new crossings. The road proposed to be constructed in lieu of the one taken lies between a siding which adjoins the main tracks of defendant company and the bank of Streets Run, which at this point is from ten to twelve feet above the bed of the creek, and in our opinion would be more dangerous than the old road, both on account of the shifting of cars on the siding and their obstructing a view of the tracks at and below the crossing. From the testimony now before us we are not satisfied that the new location at this point is the 'most favorable' that can reasonably be secured. This being an important road, and considerably traveled, we are of opinion this case should be fully heard be-

Chicago, etc., Ry. Co. v. O'Donnell

fore determining definitely whether a perpetual injunction should be issued restraining defendants from making the changes proposed at Willock, and that in the meantime matters should remain in statu quo. Perhaps before the final hearing the parties can agree on a new location which will obviate the danger which now seems apparent from the present proposed new location."

The court entered a decree continuing the injunction restraining the defendants from changing or interfering with the changed road at or near Willock station until further order of the court.

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, POTTER, and THOMPSON, JJ.

John S. Wendt and Johns McCleave, for appellant.

William B. Rodgers and H. M. Stille, for appellee.

PER CURIAM. The court is of opinion that this is not a case for preliminary injunction. Decree reversed, and injunction dissolved.

CHICAGO, R. I. & P. Ry. CO. v. O'DONNELL.

(Supreme Court of Nebraska, Dec. 21, 1904.)

[101 N. W. Rep. 1009.]

Negligence—Pleading.*

A general allegation of negligence is good against a demurrer, and under such an allegation evidence of any fact which contributed to the

*See *Citizens' St. R. Co. v. Jolly* (Ind.), 8 R. R. R. 175, 31 Am. & Eng. R. Cas., N. S., 175; *Louisville & N. R. Co. v. Jones* (Fla.), 8 R. R. R. 694, 31 Am. & Eng. R. Cas., N. S., 694; *New York, C. & St. L. R. Co. v. Kistler* (Ohio), 4 R. R. R. 340, 27 Am. & Eng. R. Cas., N. S., 340 (petition should state the acts of commission or omission which it is claimed caused the injury; and, that statement being made, it is sufficient to aver that such acts were carelessly or negligently done or omitted); *Hill v. Fairhaven & W. R. Co.* (Conn.), 4 R. R. R. 919, 27 Am. & Eng. R. Cas., N. S., 919 (allegation in a complaint, as to acts otherwise not wrongful, that they were done negligently, is not a conclusion of law, but a proper statement of facts); *Lake Shore & M. S. Ry. Co. v. Butts* (Ind. App.), 1 R. R. R. 898, 24 Am. & Eng. R. Cas., N. S., 898 (an allegation that the acts complained of were negligently done will not render the complaint invulnerable to demurrer, where it appears from the specific facts stated that the acts charged were lawful and proper); *Chicago, R. I. & P. Ry. Co. v. Young* (Neb.), 14 Am. & Eng. R. Cas., N. S., 343 (action for injury to passengers). See note appended to *Denver & R. G. R. Co. v. Thompson* (Colo.), 14 Am. & Eng. R. Cas., N. S., 47 (even where a statute throws the burden of proof upon the railroad to show that the killing of stock upon its tracks was not due to negligence, it is essential that plaintiff should plead negligence on the part of the company); *New York, N. H. & H. R. Co. v. O'Leary* (C. C. A.), 14 Am. & Eng. R. Cas., N. S., 718; *Crawford v. Southern Ry. Co.* (Ga.), 16 Am. & Eng. R. Cas., N. S., 829; *San Antonio & A. P. Ry. Co. v. De Ham* (Tex.), 16 Am. & Eng. R. Cas., N. S., 843; *Sirk v. Marion St. Ry. Co.* (Ind. App.), 2 Am. & Eng. R. Cas., N. S., 223; *Walker v. McNeill* (Wash.), 11 Am. & Eng. R. Cas., N. S., 738; *Fagg v. Louisville & N. R. Co.* (Ky.), 22 Am. & Eng. R. Cas., N.

Chicago, etc., Ry. Co. v. O'Donnell

injury sued for is competent and relevant. *Omaha & Republican Valley Ry. Co. v. Wright*, 68 N. W. 618, 49 Neb. 456.

Petition—Amendment—New Cause of Action.

Original petition and amended petition examined and compared, and *held*, that the amended petition does not state a new or different cause of action from that set forth in the original petition.

(Syllabus by the Court.)

Commissioners' Opinion. Error to District Court, Lancaster County; Frost, Judge.

Action by Murty D. O'Donnell, by Mary O'Donnell, his next friend, against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Billingsley & Greene, R. H. Hagelin, M. A. Low, W. F. Evans, and Paul E. Walker, for plaintiff in error.

T. J. Doyle and Geo. A. Adams, for defendant in error.

LETTON, C. This action was brought by Murty D. O'Donnell, by his next friend, Mary O'Donnell, against the Chicago, Rock Island & Pacific Railway Company, to recover damages for injuries alleged to have been inflicted upon him while passing along Vine street in the city of Lincoln on his way home from school. For a statement of the case see *O'Donnell v. C., R. I. & P. Ry. Co.*, 91 N. W. 566. After a judgment for the defendant, error proceedings were pros-

S., 171 (all defendant's acts of negligence may be alleged in one paragraph of petition); *Railroad Co. v. Bouldin* (Ala.), 5 Am. & Eng. R. Cas., N. S., 708; *Omaha R. V. R. Co. v. Wright* (Neb.), 4 Am. & Eng. R. Cas., N. S., 9 (allegation of negligence as a legal conclusion); *Indianapolis Union Ry. Co. v. Houlihan* (Ind.), 21 Am. & Eng. R. Cas., N. S., 915 (allegation that injures inflicted "by reason of all of defendant's negligence" includes an allegation of the negligence of the engineer); *Rinard v. Omaha, etc., Ry. Co.* (Mo.), 22 Am. & Eng. R. Cas., N. S., 34 (employee whose negligence was cause of injury need not be specified in complaint); *Connell v. Chesapeake & O. R. Co.* (Ky.), 19 Am. & Eng. R. Cas., N. S., 236 (evidential facts constituting negligence need not be pleaded); *Omaha, etc., R. Co. v. Wright* (Neb.), 5 Am. & Eng. R. Cas., N. S., 419 (general allegation of negligence); *McManamee v. Missouri Pac. R. Co.* (Mo.), 5 Am. & Eng. R. Cas., N. S., 474; *Olson v. Great Northern Ry. Co.* (Minn.), 7 Am. & Eng. R. Cas., N. S., 241 (allegation that defendant negligently ran certain cars against a tender with such force as to injure plaintiff is sustained by proof that it negligently omitted to do an act from which such results followed); *Brown v. Chicago, R. I. & P. Ry. Co.* (Kan.), 11 Am. & Eng. R. Cas., N. S., 408 (there can be no recovery upon grounds of negligence other than those alleged in the petition); *Louisville & N. R. Co. v. Shearer* (Ky.), 20 Am. & Eng. R. Cas., N. S., 138 (sufficiency of petition); *Omaha, etc., R. Co. v. Wright* (Neb.), 5 Am. & Eng. R. Cas., N. S., 419 (where pleader relies upon one or more specific acts, evidence of any other acts is irrelevant); *Spires v. South Bound R. Co.* (S. Car.), 5 Am. & Eng. R. Cas., N. S., 708; *Highland Ave. & B. R. Co. v. Swope* (Ala.), 13 Am. & Eng. R. Cas., N. S., 856; (alternative allegations); *Traver v. Spokane St. Ry. Co.* (Wash.), 22 Am. & Eng. R. Cas., N. S., 759 (admissibility of evidence where general and specific allegations of negligence); *Cederson v. Oregon R. & Nav. Co.* (Ore.), 22 Am. & Eng. R. Cas., N. S., 655 (evidence of ownership of locus in quo admissible under general allegation of owner-

Chicago, etc., Ry. Co. v. O'Donnell

ecuted to this court, whereupon the cause was reversed and remanded to the district court. After the cause was remanded the plaintiff filed an amended petition, to which the defendant answered. Plaintiff filed a reply, the cause was again tried, judgment rendered for the plaintiff, a motion for a new trial filed and overruled, and the defendant now prosecutes error to this court.

There is only one ground of error relied upon and discussed in the briefs, and that is that the amended petition sets up a new and different cause of action from that alleged in the original petition, and that this new cause of action is barred by the statute of limitations. The essential parts of the first petition necessary to consider to determine this question are that the defendant, on the 18th day of November, 1898, stopped a large freight train across Vine street between Eighteenth and Nineteenth streets, "and kept and wrongfully and carelessly and negligently held said train across said street, blockading all passageways along said street and the sidewalks along either side thereof, and for a long distance each way north and south therefrom, for an unusually long period of time, to wit, one-half hour and more, and that during all of the said time that said train of cars was so wrongfully, carelessly, and negligently kept by the defendant across said street and obstructing the passage over and along the same and the sidewalks on either side thereof, and for a long distance each way north and south therefrom, there was no way for persons to go along said street or the sidewalks, or to in any way travel said street at said point, or across said railway track at said point, except to go between the cars composing said train. That the point or place where said railway track and said Vine street crossed each other at

ship); *Baker v. Louisville & N. Terminal Co.* (Tenn.), 20 Am. & Eng. R. Cas., N. S., 946 (legal conclusion); *Central of Georgia Ry. Co. v. Forshee* (Ala.), 18 Am. & Eng. R. Cas., N. S., 467; *Illinois Cent. R. Co. v. Davis* (Tenn.), 18 Am. & Eng. R. Cas., N. S., 708; *Schweinfurth v. Cleveland, C., C. & St. L. Ry. Co.* (Ohio), 15 Am. & Eng. R. Cas., N. S., 73; *Sims v. Western & A. R. Co.* (Ga.), 17 Am. & Eng. R. Cas., N. S., 756; *Walton v. Chattanooga Rapid Transit Co.* (Tenn.), 19 Am. & Eng. R. Cas., N. S., 436 (defective brake may be shown under general allegation of negligence); *Louisville & N. R. Co. v. Clark* (Ky.), 12 Am. & Eng. R. Cas., N. S., 407 (plaintiff confined to negligence alleged in petition); *Beath v. Rapid Ry. Co.* (Mich.), 15 Am. & Eng. R. Cas., N. S., 793 (pleading and proof in action for personal injuries); *Pittsburg, C., C. & St. L. Ry. Co. v. Moore* (Ind.), 14 Am. & Eng. R. Cas., N. S., 678 (pleading tested by demurrer must rely solely on its own averments); *Louisville & N. R. Co. v. Marbury L. Co.* (Ala.), 18 Am. & Eng. R. Cas., N. S., 508 (sufficiency of allegation of negligence); *Thomas v. Louisville, etc., Ry. Co.* (Ky.), 5 Am. & Eng. R. Cas., N. S., 708 (variance in pleading and proof of negligence); *Lang v. Brady* (Conn.), 21 Am. & Eng. R. Cas., N. S., 843 (whether necessary to allege particular acts of negligence in action for injury to freight); *Alabama, G. S. R. Co. v. Johnston* (Ala.), 20 Am. & Eng. R. Cas., N. S., 909; *Lemery v. Boston & M. R. Co.* (Mass.), 11 Am. & Eng. R. Cas., N. S., 17 (specifications of negligence); *Cambron v. Omaha, etc., R. Co.* (Mo.), 23 Am. & Eng. R. Cas., N. S., 634; *Haner v. Northern Pac. Ry. Co.* (Idaho), 19 Am. & Eng. R. Cas., N. S., 628.

said time was in and near to a thickly settled part of the city of Lincoln, Nebraska, and there was at said time much travel over, upon, and along said Vine street at said point and place, and the defendant at said time, and by so wrongfully, carelessly, and negligently placing its said train of cars upon its said railway track, and across said Vine street for an unreasonable length of time, obstructed and prevented all travel along said Vine street at that time. That the plaintiff, Murty D. O'Donnell, was passing and traveling along said street on said day, and in the afternoon thereof, on his way home from school, and it became necessary for him to pass along said street at the point where said railway train was so wrongfully, carelessly, and negligently by defendant kept across said street and obstructing the same, and in attempting to cross the said track, without any fault of his, and by and through the negligence of the defendant and its employees, he was violently and forcibly thrown from said train upon the ground and railway track and under the wheels of the car of the same, and the said train of cars and the wheels thereof passed upon and over the leg of the plaintiff, seriously lacerating, injuring, and damaging the same. * * * That by reason of said injury so received by the plaintiff, Murty D. O'Donnell, and by and through the negligence of the defendant and its employees, the plaintiff, Murty D. O'Donnell, has become and is permanently and seriously injured in the loss of his limb, and thereby made a cripple for life. That by reason of said injury so wrongfully, carelessly, and negligently caused by the defendant, and because of said suffering and pain so likewise caused by the defendant, the plaintiff, Murty D. O'Donnell, has been damaged, etc." The allegations in the original and amended petitions, so far as the original petition is copied above are, substantially alike, though the language of the pleader is not exactly the same verbatim et literatim, and no question is raised as to their identity of allegation thus far. In the amended petition, however, the following additional paragraph is inserted: "The plaintiff further avers that at the time the plaintiff, Murty D. O'Donnell, was crossing said railroad track along said Vine street, which was so obstructed by the defendant, as aforesaid, on account of said obstruction remaining on said street for said unusual length of time, it became necessary for the plaintiff to go upon said cars and to cross the same in so doing, and while the plaintiff was thus upon said cars, for the purpose of crossing said track, the defendant, through its engineer operating the engine which was hauling this train of cars, discovered the said plaintiff, Murty D. O'Donnell, and knew that he was a mere child of tender years, and defendant fully realized the perilous condition of said Murty D. O'Donnell, and the great peril and danger to said plaintiff, both of life and limb, by moving said train and continuing to move the same, while said plaintiff was in said perilous condition,

through no fault or negligence upon the part of plaintiff, the defendant, notwithstanding its full knowledge of said danger to the plaintiff, and notwithstanding the fact that it had the power to instantly stop said train of cars and avert any possible injury to the plaintiff, continued to carelessly, negligently, and with wanton disregard for the safety of plaintiff, to move said train of cars, thereby causing the injury, as hereinbefore described, to the plaintiff."

It is earnestly urged by the plaintiff in error that the allegations in the fourth paragraph of the amended petition thus set forth constitute a new and different cause of action from that contained in the original petition. It is argued that in the original petition there was no general allegation of negligence; that it was not based upon the negligence or improper conduct of the employees of the railway company, but rested entirely upon the allegation that the railway company obstructed a public street for an unwarranted length of time, compelling the plaintiff to pass between the cars, whereby he received the injuries for which he sought to recover, and that, if a new cause of action is stated, sufficient time has elapsed to bar a recovery. The plaintiff, on the other hand, contends that the additional matter set forth in the amended petition is merely an amplification and more specific statement of the general allegations of negligence set forth in the original petition, and that under the pleadings in the original cause he was entitled to prove and did prove all the facts alleged in the amended petition.

The original petition sets forth in detail the blockading of the street by the train. It then alleges that "in attempting to cross the said track, without any fault of his and by and through the negligence of the defendant and its employees, he was violently and forcibly thrown from said train upon the ground and railway track and under the wheels of the cars," and further alleges "that by reason of said injury so received by the plaintiff, Murty D. O'Donnell, and by and through the negligence of the defendant and its employees, the plaintiff has become and is permanently and seriously injured," etc. Under these general allegations of the negligence of the defendant and its employees, any negligence upon the part of the employees of the defendant by reason of which the plaintiff was violently and forcibly thrown from the train could properly have been admitted in evidence. It is the settled doctrine of this court that a general allegation of negligence is good against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant. *Omaha & Republican Valley Ry. Co. v. Wright*, 49 Neb. 456, 68 N. W. 618; *Omaha & Republican Valley Ry. Co. v. Crow*, 54 Neb. 747, 74 N. W. 1066, 69 Am. St. Rep. 741. The most specific allegation of negligence in the *Wright Case* was "that the said defendant, carelessly and negligently, by its employees

Chicago, etc., Ry. Co. v. O'Donnell

and servants, in operating said train ran their said engine and train in, over, and upon said plaintiffs' stock, when, by exercising proper care and skill in the management and handling of its engine and train, it could have stopped said train long before striking said plaintiff's stock. * * *—and the court said: "Wright and others, in their petition in the case at bar, charged the railway company generally with negligence, and under these allegations we think that it was competent for them to introduce evidence of the fact, if it was a fact, that the engineer in charge of the train saw, or by the exercise of due care could have seen, the cattle in time to have stopped the train and avoided injuring them. * * *

In other words, where a pleader relies upon certain specific acts or omissions as negligence, he is limited to such specific acts or omissions. If he pleads negligence generally, he may introduce evidence of any act or omission which tends to support his pleading."

The gist of the fourth paragraph in the amended petition in this case is that the engineer, after he discovered the perilous condition of the plaintiff, continued to negligently move the train of cars, thereby causing the injury. In connection with this allegation it is important to note that in the opinion rendered upon the former hearing of the case in this court, which opinion was offered in evidence by the defendant, it is said: "There was no conclusive presumption of negligence on the engineer's part merely because he saw a boy of eight years jumping on the stirrup and ladder of a freight car going not more than three miles an hour, and jumping off again, and failed to stop and remove him. Whether such failure to act on the engineer's part was negligence was for the jury to say. The acts complained of in this petition are the leaving of the train upon the crossing, and violently and forcibly throwing the plaintiff from the train, and passing of its wheels over plaintiff's leg, though 'negligence of the defendant and its employees.' Whatever negligence was connected with these acts, and caused the injury through them, was provable and to be considered." And again: "Instruction 9, as given by the court, told the jury that a child jumping on and off a train would be a trespasser, and this fact, if they found it, should be considered, and would constitute contributory negligence on his part if they found he was of sufficient age and discretion to be guilty of negligence. It is also stated that if defendant should discover the child in imminent danger, and failed to exercise reasonable care, where such care would have prevented the injury, the child's action would be no defense. The court's instruction submitted the question fully." It is held, therefore, that one of the facts which was proper to be proved under the general allegation of negligence in the original petition was that the engineer discovered the plaintiff upon the train and negligently continued to move the same after

Norwich Ins. Co. v. Oregon R. Co

such discovery, thereby causing, as claimed, the injury of the plaintiff, and that evidence tending to show negligence of this character was properly introduced at the former trial. This is the law of the case, and must be applied here.

The plaintiff might have been required by motion at the first trial to have made his petition more definite and certain, and might properly have included therein the specific facts now alleged in the fourth paragraph of the amended petition. He was not required to do so, but did so on his own volition upon the second trial. Such allegations were merely an amplification and expansion of the facts set forth in the first petition, and constitute no change of the cause of action and no new or different claim. The general allegation of negligence in the form made in the first petition is wide enough to include them. We think it unnecessary to cite any further authority in this matter. The rules which govern the determination of this case are plain and positive. We think it clear that the amended petition is only a more expanded statement of the original one.

We recommend, therefore, that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

NORWICH INS. CO. v. OREGON R. CO.

(Supreme Court of Oregon, Jan. 3, 1905.)

[78 Pac. Rep. 1025.]

Fires Set by Locomotives—Evidence—Spark Arresters.

Where a railroad company seeks to show that it uses on its locomotives the spark arrester recommended by the Master Mechanics' Association, it should do so by the record of such recommendation, rather than the oral statement of a member of such association.

Harmless Error.

The error, if any, in the exclusion of evidence in the form offered, is harmless, where there was other evidence of the same fact, and of as strong a character, admitted without objection.

Fires Set by Locomotives—Negligence—Instructions.

Where it is shown that a fire was the result of the operation of defendant's railroad train, an instruction that "it is not necessary that any specific act of negligence be pointed out, if the circumstances established are such as a jury may infer negligence from, such as running at a high rate of speed, working the engine hard, overloading it, or other acts indicating an unusual course in operating the engine," etc., is not erroneous, as assuming that the train was running at a high rate of speed.

Same—Same—Pleading and Proof.

The allegations in the complaint that the engine which caused the fire "was unskillfully and improperly constructed, and improperly and negligently managed by defendant and its servants, and, by reason of said improper and negligent management, large quantities of sparks

Norwich Ins. Co. v. Oregon R. Co

were emitted," etc., are sufficiently broad to let in proof of the character of the care and caution exercised by defendant's employees in managing the engine referred to as doing the damage, and whether they were negligent in the performance of their duties.

Same—Habitual Carelessness of Employees.*

Where it is found that the employees in charge of the engine which caused the fire had usually been careless or negligent in operating it, the jury may reasonably conclude that they were negligent at the time the fire in question was started.

Appeal from Circuit Court, Umatilla County; W. R. Ellis, Judge.

Action by the Norwich Insurance Company against the Oregon Railroad Company. There was judgment for plaintiff, and defendant appeals. Affirmed.

This action is to recover damages for loss occasioned by fire alleged to have been caused by the negligent operation and management of a freight train and certain engines used for propelling it. The plaintiff recovered judgment, and the defendant appeals.

H. F. Conner, for appellant.

J. J. Balleray and John McCourt, for respondent.

WOLVERTON, J. The errors assigned for reversal arise upon the direction of the court in taking an item of evidence from the jury, and upon certain instructions given on the submission of the case.

J. F. Graham, a witness for the defendant, testified that he was a master mechanic; that he had had many years of experience with various railroad companies in the motive power and car department, and had been for nine years in charge of the defendant's rolling stock; that he knew of no appliance that would entirely prevent the escape of sparks from locomotives; that the Master Mechanics' Association was an aggregation of master mechanics throughout the country, which met once a year; that all the railroads in the country were represented at their annual meetings, at which different questions pertaining to locomotive construction were discussed; that the appliance for preventing the escape of sparks from locomotive stacks, known as the extension front end, in general use all over the country, was adopted by the railroads in general, and by the Master Mechanics' Association. Whereupon the following question was put to him, namely: "They [the Master Mechanics' Association] recommended the extension front end?" To which he answered: "Yes, sir." On motion of plaintiff's counsel, this answer was withdrawn from the jury, and the defendant predicates error upon the action of the court in that regard. It is insisted that this matter was pertinent to show that defendant had exercised due and reasonable care in selecting and

*See foot-note appended to *Illinois Cent. R. Co. v. Watson's Adm'r* (Ky.), 10 R. R. R. 27, 33 Am. & Eng. R. Cas., N. S., 27.

adopting the most approved appliance in modern use for the prevention of the escape of sparks from its locomotives. This may be conceded. It is next argued that parol evidence is admissible to show the action of the association in making the recommendation. It is so familiar to those who have any knowledge at all of the manner of conducting the meetings of such associations, and the business transacted thereat, that minutes or records of the proceedings are kept, that it must be taken judicially to be the general rule and practice. These minutes or records constitute, of course, primary evidence of what was done; and, in so far at least as they affect third parties—those not participating in or connected with the association or the business transacted by it—the better reason would suggest that the best evidence should be produced, or, as is usual in other cases, its absence accounted for before admitting parol evidence of their contents, or it be shown that no minutes were kept before resorting to parol to show what was done. These observations would have no application, of course, where it was sought to impeach the record, for in such a case parol evidence is always permitted to show what was actually done. The objection to the admission of the parol statement was based upon the ground that it was not the best evidence, as well as upon its immateriality and irrelevancy, and, as the absence of the record or minutes of the association showing the recommendation was not accounted for, we think the statement of the witness was properly taken from the jury. But however this may be, if we concede that there was error in withdrawing this particular proof, it would hurt so little that it would be scarcely perceptible, because the witness had previously testified that this arrester had been adopted by the railroads in general and by this association, and, when it was asked if the association recommended the patent, the court said it could not permit the proof in that way; but proof in fully as strong, if not a stronger, form was already before the jury without objection. The error, therefore, is not well assigned.

The next assignment is based upon the ninth paragraph of the court's charge to the jury, which is as follows:

"It is not necessary that any specific act of negligence be pointed out, if the circumstances established are such as a jury may infer negligence from, such as running at a high rate of speed, working the engine hard, overloading it, and other acts indicating an unusual course in operating the engine—are things the jury may consider in determining whether or not the defendant was guilty of negligence." An objection to the instruction is that it assumes a fact touching which there was no evidence tending to establish, namely, the running of the train at a high rate of speed. This, we are satisfied, mistakes the intendment of the court. The purpose is manifest not to charge the jury as though the running of the train at a high rate of speed was a fact in evidence, or as if

there was evidence tending to prove the fact, but the expression was employed as illustrative, merely, to indicate the manner and nature of the acts from which the jury might infer negligence in the absence of proof of any specific acts which in themselves would constitute negligence. In other words, the court instructed that direct proof of the identical act or acts of negligence that permitted the escape of fire and its communication to the building was not necessary, but, when it is seen that the fire was the result of the operation of the train, then that the jury may infer negligence, in the absence of any direct proof of the kind suggested, from any acts of the company's agents or employees indicating an unusual course, and calculated to contribute to the result. Then, as illustrative of such acts as may be so considered, the court enumerates, among others, the running of the train at a high rate of speed, not that they had a right to consider the fact as one attempted to be shown, and, if found to be true, that it would constitute a circumstance from which they could infer negligence. In this view, the instruction was not misleading, and therefore not error.

We may say in this connection that whether the fact of running a train at a high rate of speed is an act of negligence depends always upon the circumstances, environments, and conditions under which it is being so propelled. A case is hardly conceivable where it would be proper for the court to say that the running of a train at a high rate of speed is *per se* negligence, or within itself negligence, as a matter of law; but, when connected with the environments, such as passing through a populous city, or in proximity to buildings highly inflammable, especially when used in connection with the operation of the road, and under conditions that cause the engines to labor excessively, and thereby emit unusual quantities of sparks and fire, it might constitute an act from which the jury could very properly infer negligence in the absence of direct proof. This seems to be the doctrine of the texts and the cases cited. 2 Thompson, Neg. § 1873; *Perdue v. Louisville & Nashville R. Co.*, 100 Ala. 535, 14 South. 366; *Gandy v. Chicago, etc., R. Co.*, 30 Iowa, 420, 6 Am. Rep. 682; *Hagan v. Railroad Co.*, 86 Mich. 615, 49 N. W. 509; *Brusberg v. Milwaukee, etc., R. Co.*, 50 Wis. 231, 6 N. W. 821; *Kansas City, Ft. Scott, etc., R. Co. v. Chamberlin* (Kan. Sup.) 60 Pac. 15. That the court's instruction is readily susceptible of the construction we have given it is also inferable from other instructions in connection with which it must be read, notably the fourth, tenth, and nineteenth, and some others that follow.

The third and last assignment of error is predicated upon the twelfth paragraph of the charge. It is in language following:

"You have a right to take into consideration every fact and circumstance which tends to demonstrate, subject to the ex-

planation of the defendant, the kind of care and caution usually exercised by defendant's employees in charge of the engine which is alleged to have set the fire, and also the sufficiency of the equipments for preventing the escape of fire used by the defendant on this train in operating the same, and to judge as to the probable state of repair in which the engines which hauled this train were."

Two objections are noted and relied upon. The first, briefly stated, is that the instruction submitted to the jury an issue outside the pleadings; and the second, that, the engines doing the damage having been identified, it was not proper for the jury to consider what the employees may have done usually, as bearing upon or having anything to do with what they did at the time the fire was communicated. It is alleged that the engine "was unskillfully and improperly constructed, and improperly, carelessly, and negligently run and managed * * * by said defendant, and by its agents, servants, and employees, and, by reason of said * * * improper, careless, and negligent management, * * * large quantities of sparks" "were emitted and ejected," etc. This is manifestly broad enough to let in proof of the nature and character of the care and caution exercised by such servants and employees in conducting and managing the particular engine or engines alluded to, and involved in doing the damage, and whether or not they were negligent in the performance of their duties. There was no attempt to instruct, as it seems to be inferred, that the jury might consider whether the company had employed unskillful agents and employees, or as to whether the employees were in fact unskillful, as contradistinguished from careless or incautious. The authorities cited, namely, *Babcock v. Chicago R. Co.*, 72 Iowa, 197, 28 N. W. 644, 33 N. W. 628, and *Gulf, etc., R. Co. v. Johnson* (Tex. Civ. App.) 67 S. W. 182, go to that sort of case, but are without application here. The objection is therefore untenable. As to the second it should be observed that the term "usually" was applied to the employees in charge of the particular engines in question, not to the employees in general or to those in charge of other engines; and the inference deducible from the instruction is that, if the employees in charge of this engine had usually been careless and incautious or negligent in running it, if the jury found such to be the case, they might reasonably conclude that they were negligent at this particular time; and in this interpretation there is no vice in the instruction, under whatever view we may take of the law as to whether it may be permitted to show generally that other engines had scattered fire at other times, or that other persons in charge of them were usually careless or negligent. *Lesser Cotton Co. v. St. Louis, etc., R. Co.*, 114 Fed. 133, 52 C. C. A. 95.

The judgment of the trial court should be affirmed, and it is so ordered.

DOTTA v. NORTHERN PAC. RY. CO. et al.

(Supreme Court of Washington, Dec. 31, 1904.)

[79 Pac. Rep. 32.]

Collision with Trespasser on Trestle.

In an action against a railroad for personal injuries to plaintiff sustained in an attempt to cross a narrow trestle of the defendant while cars were standing on it, and on which there was no provision for pedestrians, evidence *held* insufficient to show that plaintiff was anything more than a trespasser at the time of his injury.

Same—Wantonness.

The evidence was also insufficient to show that the injuries were the result of wantonness on the part of the defendant's servants.

Duty of Railroad to Trespasser on Tracks.*

A railroad owes no duty to a trespasser on its tracks, whose presence there is not known to its trainmen, and who have no reason to suspect the presence of a person on the track at the place of the injury.

Same—"Last Clear Chance" Theory—Application.

Where a person is injured by being struck by a car while trespassing on the tracks of a railroad, the "last clear chance" theory has no application in the absence of evidence that the trainmen knew of his presence, or that to move the car by which he was struck would likely injure him.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by Joe Dotta against the Northern Pacific Railway Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Carkeek & Childs and John T. Condon, for appellant.

Jas. F. McElroy, B. S. Grosscup, and Piles, Donworth & Howe, for respondents.

FULLERTON, C. J. This is an action for personal injuries. From the record it appears that the respondent the Columbia & Puget Sound Railroad Company had constructed a railroad track extending from First Avenue South, in the city of Seattle, eastward between Dearborn and Charles streets to the main terminal tracks of the Northern Pacific Railway Company, which was used by the latter company as a switching track, and a track upon which it occasionally stored or left its cars. The track was constructed originally on a trestle over the waters of Elliott Bay, and stood some 18 or 20 feet above the water at low tide, but the space had been filled in from time to time underneath the track until the distance was somewhat lessened, averaging perhaps 12 feet at the time of the appellant's injury, which happened on the 25th day of June, 1902. The track, when not obstructed

*See foot-notes appended to *Hortenstine v. Virginia-Carolina Ry. Co.* (Va.), 12 R. R. R. 616, 35 Am. & Eng. R. Cas., N. S., 616; foot-note appended to *Gregory v. Louisville & N. R. Co.* (Ky.), 12 R. R. R. 293, 35 Am. & Eng. R. Cas., N. S., 293; foot-note appended to *Carter v. Southern Ry. Co.* (N. Car.), 11 R. R. R. 324, 34 Am. & Eng. R. Cas., N. S., 324.

with cars, furnished a convenient way for those desiring to pass to and from First Avenue South to the water front, and was extensively used for that purpose, particularly by the employees of several large manufacturing plants situated on the water front. The respondents, although they seem not to have forbidden the use of the trestle by pedestrians, did not invite or encourage travel over it by the manner of its construction. It was made unusually narrow; so narrow, in fact, that when cars were standing upon it there was but a very small space beside the cars and the ends of the ties along which a footman could pass, and this was made more difficult of passage by the occasional insertion of short ties, which left gaps in the way from three to five feet wide, which had to be crossed. Because of its peculiar construction it was known locally as the "slim track." No planks were laid upon it either between the rails or elsewhere over which a person could walk, and, while it was shown that it was freely used as a passageway when clear, it appeared that it was very seldom that any one crossed over it when cars were standing upon it. Neither of the respondent companies had forbidden in any public manner the use of the track as a passageway, nor did they maintain lookouts or guards to warn pedestrians of the times it was going to be put into use by themselves. On the afternoon of the day above-mentioned, the appellant, desiring to cross from First Avenue South to the water front, started over this trestle. At that time it contained several cars, the one closest to him being a large furniture car taking up almost the entire width of the trestle. Beyond it, and towards the Northern Pacific's main track, were several coal cars. When the appellant reached the furniture car, he climbed upon it, and walked its full length along the top, when, seeing the coal cars ahead of him, he retraced his steps and climbed down to the track on the ladder he used in getting onto the car. He then crossed over to the other side of the track, and looked along the trestle, apparently for the purpose of ascertaining if there was room to pass along the side of the cars. He then turned, and started to make his way back to the street. As he started back, an engine, which had backed onto the switch from its opposite end, butted into the standing cars, causing them to move towards and against the appellant, knocking him over and breaking his leg, and causing the injury for which he sues. There is some dispute in the evidence as to how far the cars moved after being struck by the engine, the witnesses for the appellant varying in the estimates from a foot and a half to ten feet, but the correct distance is probably a little more than the lesser, and much less than the greater, estimate—probably three or four feet. There would seem, however, to be nothing unusual in the fact that the cars moved when struck by the engine, or in the fact that they were so struck. It was simply the usual method of making a coupling

where an engine couples onto a train of standing cars. At the moment the engine struck the cars the appellant was in a position where he could have been seen from the engine had a lookout been maintained for him. How long he had been in that position can only be conjectured, but at most it could have been but a short space of time. When he was on top of the box car he was in view also from the end of the switch that the engine entered. Where the engine was then is not shown, but the appellant says he did not see it, and presumably it was out of sight. Be this as it may, however, it is apparent that the appellant was in a position to see the engine at all times when the engineer or fireman could have seen him, and could easily have protected himself from injury had he but exercised his faculties. The foregoing is, in substance, the facts as they appeared from the appellant's evidence. At the conclusion of its introduction the respondents challenged its sufficiency, and moved that the case be withdrawn from the jury, and a judgment for the respondents entered. The motion was granted, and this appeal is from the judgment so entered.

The principal controversy between the parties is over the question of their respective relations at the time of the injury. The appellant contends that he was a licensee, on the track of the respondents as of right, and that the respondents were bound to exercise towards him reasonable care in the movement of their cars so as to protect him from injury, and that the question whether they did exercise such reasonable care was, under the evidence, a question for the jury, and not for the court. On the other hand, the respondents contend that the appellant was a trespasser, and, inasmuch as it was not shown that they had knowledge of his presence on their track, they were liable only in case of such gross negligence on their part as would amount to wantonness, and that there was no proof of any such gross negligence. It is not contended, of course, by the appellant, that he had any special permit to use this part of the respondents' track as a footpath, or that the respondents had by grant, or any affirmative act, conferred that right upon the public; but he contends that a license to use it is to be inferred from the fact that large numbers of people had so used it without remonstrance on the part of the respondents. This court has held, in common with many other courts (*Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855), that if a railroad company permits the public for a long time to pass over its track at some given point, or to use it as a footpath between given points, without objection or hindrance, its consent or acquiescence in such use would be presumed, and it was bound to operate its cars with reference thereto. In such cases the railroad company and the people have a common right or a joint use in the track as a public way, and the right of each must be regarded. But it is not to be in-

ferred from slight circumstances that a railway company has granted to the public a joint use of its track between given points. The track is constructed primarily for the purpose of carrying passengers and freight in cars, and its use as a footpath is secondary always. To permit its use as a footpath greatly increases the danger to those traveling in cars, and it is not the policy of the law to encourage such use, and, unless a clear right to be upon the track at the given place is shown, a footman thereon is to be regarded as a trespasser. In certain instances, of course, a joint use must be reserved to the public. For example, the public must have the right to cross at fixed places, and it is usually held that a public crossing has been acquired by user on much less evidence than is required to establish a public way along the track; the one being in nearly every instance a necessity, while the other is usually only a mere matter of convenience. Indeed, in some of the states it seems to be held that a right of way along the track cannot be acquired by user merely, unless it be at the station or depot grounds or in the yards, where the public naturally resort. As was said by the Supreme Court of Wisconsin in *Anderson v. Chicago, St. Paul, Minneapolis & Omaha R. Co.*, 87 Wis. 195, 58 N. W. 79, 23 L. R. A. 203: "It has frequently been held in this and other states that where the grounds of a railway are used by pedestrians for a considerable time without objection, or with acquiescence on the part of the company, a pedestrian crossing over the same thereby becomes a licensee, and is no longer to be considered as a mere trespasser acting at his peril, and that it is the duty of the company to exercise increased prudence and caution in operating its road at such point, and to keep a reasonably vigilant lookout to prevent injury or accident to those so crossing its grounds. [Citing cases.] In all these cases the injury occurred at the station or on the depot grounds or yard, where parties would naturally resort and cross over the same, and where the agents and servants of the company could exercise a proper degree of care and watchfulness under the circumstances; but we have not met with any case in which the point was necessary to the decision where it has been held that a license can be implied from such acts of frequent use by pedestrians or wayfarers of the main track or bridges or trestles distant from such places as a pathway for travel, though we find that in other states the rules of implied license has been applied to parties frequently crossing the track at particular points other than regular crossings." See, also, *Schug v. The Chicago, Milwaukee & St. Paul R. Co.*, 102 Wis. 515, 78 N. W. 1090; *Spicer v. Chesapeake & O. Ry. Co.*, 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385; *Ward v. Southern Pacific Co.*, 25 Or. 433, 36 Pac. 166, 23 L. R. A. 715; *Brown's Adm'r v. Louisville & Nashville Railroad Co.*, 97 Ky. 228, 30 S. W. 639. But, if the rule be otherwise in this state as to the right to acquire a joint right along the track,

Atlanta, etc., R. Co. v. Lovelace

such right is only acquired by use so definite and long existing as to clearly impute acquiescence on the part of the railroad company in such use. The very slight use made of the trestle in question here by pedestrians when cars were standing upon it cannot be held to confer such a joint right. We conclude, therefore, that the appellant at the time of his injury was a trespasser, and that the defendants could be held liable for such injury only in case their conduct was so grossly negligent as to amount to wantonness. *Matson v. Port Townsend, etc., R. R. Co.*, 9 Wash. 449, 37 Pac. 705. The record in the case before us shows nothing of wantonness or willfulness on the part of the defendants. It is not in evidence that the servants of respondents observed the presence of the appellant on the track, or that they had any reason to suspect it, and they owed him no duty to look out for him. His injury, for that reason, although lamentable, must be held to be the result of his own negligence, rather than because of the default of the respondents.

This view of the relation of the parties renders it unnecessary to discuss the other questions suggested in the argument of the appellant. The "last clear chance" theory, so ably briefed, can have no application, because there are no facts upon which it can be based. It was not a duty of the respondents to ascertain whether the appellant was behind the car before making a coupling, even though they did know that to do so would move the car a few feet. The appellant was a trespasser. He was where he had no right to be, and it was his duty to protect himself from being injured by movements of the cars, which he must have known were liable to occur at any time. The respondents would have been liable had they actually known of his whereabouts, and had, notwithstanding such knowledge, negligently backed the car upon him; but there is no evidence in the record from which the fact that they did know of his whereabouts, or knew that to move the car would likely injure him, can be inferred; hence there is no room to apply the doctrine contended for.

The judgment is affirmed.

HADLEY, DUNBAR, and MOUNT, JJ., concur.

ATLANTA & W. P. R. CO. v. LOVELACE.

(Supreme Court of Georgia, Dec. 20, 1904.)

[49 S. E. Rep. 607.]

Crossings—Care Required of Railroad and Highway Traveler—Duty to Anticipate Negligence in Another—Instruction.*

After instructing the jury that plaintiff and defendant railroad company were bound to exercise the same degree of care to prevent a colli-

*See foot-notes appended to *Clegg v. Southern Ry. Co.* (N. Car.), 11 R. R. R. 737, 34 Am. & Eng. R. Cas., N. S., 737.

Savage v. Southern Ry. Co

sion between plaintiff's team and defendant's engine on a public crossing, it was not erroneous for the court to add to such instruction: "But one is not bound to anticipate negligence when the law commands diligence for his protection at the hands of another." The duty of exercising care to avoid the consequences of another's negligence does not arise until such negligence exist, and is either apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence. *Western & Atlantic R. Co. v. Ferguson*, 39 S. E. 306, 113 Ga. 708, 54 L. R. A. 802.

Same—Care Required of Traveler—Question for Jury.

It was not erroneous for the court to refuse to instruct the jury that it is the duty of one who attempts or intends to cross a railroad track to use his powers of hearing and seeing before going on the track. *Macon Railway & Light Co. v. Barnes* (Ga.) 49 S. E. 282. What an ordinarily prudent man would do under the circumstances is a question for the jury.

Instructions.

The request to charge, in so far as they were sound and pertinent, were fully covered by the instructions given, in which the law applicable to all the issues in the case was accurately and specifically given to the jury.

Appeal—Review.

Grounds of a motion for a new trial not approved by the trial judge will not be considered by the Supreme Court.

New Trial.

The evidence authorized the verdict, and the refusal of a new trial was not erroneous.

(Syllabus by the Court.)

Error from City Court of La Grange; F. M. Longley, Judge.

Action by L. B. Lovelace against the Atlanta & West Point Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Arthur Heyman, Dorsey, Brewster & Howell, A. H. Thompson, and R. A. S. Freeman, for plaintiff in error.

F. P. Longley and E. S. Longley, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur.

SAVAGE v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia, Jan. 12, 1905.)

[49 S. E. Rep. 484.]

Care Required of Person Walking on Railroad Track.

One walking on a railroad track is bound to listen and keep a lookout in each direction for approaching trains.

Person Seen on Railroad Track—Duty to Stop Train.*

A locomotive engineer who sees a person walking on the track is required to stop the train only after seeing that the pedestrian is taking no measures for his own protection.

Contributory Negligence.

In an action against a railroad company for injuries from being struck by a locomotive while plaintiff was walking on the track, evidence held to show plaintiff guilty of contributory negligence.

*See foot-notes appended to *Clegg v. Southern Ry. Co.* (N. Car.), 11 R. R. R. 737, 34 Am. & Eng. R. Cas., N. S., 737.

Savage v. Southern Ry. Co

Appeal from Circuit Court of City of Richmond.

Action by John Savage against the Southern Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

KEITH, P. The accident which is the subject of this suit occurred upon that portion of the main line of the Southern Railway Company between Richmond and West Point, Va., which passes through the yards of the Trigg Shipbuilding Company, in the city of Richmond. At the point of the accident the railway company was not the owner in fee of its roadbed, but occupied it and operated its road under a perpetual license derived from the Chesapeake & Ohio Railway Company. Its right of way was over a strip of land about 40 feet in width, wide enough for three tracks, but upon which only one track had been constructed. It permitted the Trigg Company to cover this space with racks and cribs for storing iron plates, rods, and other wares used in its business, leaving a space between the rail and the tracks on either side of about 5 or 6 feet.

On the 13th of March, 1902, John Savage, a young colored man in the employment of the Trigg Company, was run over by a shifting engine which was moving over this track in an easterly direction, and suffered injuries which rendered it necessary to amputate both of his legs. He brought suit, evidence was introduced before the jury, a demurrer to the evidence was interposed by the defendant, a verdict was rendered in his favor for \$8,000, judgment given for the defendant, and the case is here upon a writ of error.

The only question which we shall consider is whether the evidence was sufficient to require the court to leave the case with the jury.

The testimony tended to prove the following facts: That Savage was on that day, for the first time, in the employment of the Trigg Company. That he was unacquainted with the locality, and knew nothing of the number of trains, or with respect to their operation, over this line of railway. That he was under the impression that it was a switch track and not a main line. That the material used by the Trigg Shipyard in and about its business was stored in racks which occupied the right of way of the railroad to within 5 or 5½ feet of the rail on either side. That at noon on the day of the accident Savage took his seat upon a platform near the railroad to eat his luncheon. That, having eaten, he went to a small house near the track, where he had left his overalls, took a cigarette out of the pocket of his overall jacket, returned to the railroad, and started down the track to the east. That before going upon the track he looked and listened, but saw no train. That, going upon the track in an easterly direction, he had walked but a short distance—some of his witnesses say only about 8 or 10 feet—when he was struck

Savage v. Southern Ry. Co

by the tender attached to an engine of the Southern Railway. A short distance west of the point at which he stepped upon the railroad track there is a slight curve, which, together with the obstructions upon the right of way, hindered in some degree a view of the track in that direction. That an engine of the defendant company, moving, with its tender in front, at a rate of about 20 miles an hour, struck him and inflicted the injuries for which he sues. There is much conflict of testimony as to whether or not the bell was rung and the whistle sounded. The negative testimony is that no warning, either by bell or whistle, was given. The positive testimony of the employees upon the train is that the bell was being rung; that it operated automatically, and the machinery for ringing the bell was set in motion when the engine started. It further appears that as many, perhaps, as 1,800 hands were employed at the Trigg Shipyard, and that, with the knowledge of the railroad company, they were in the habit of using the railroad track through the shipyard as a passway.

Conceding that, under these circumstances, the defendant was guilty of negligence, it remains for us to inquire whether the plaintiff was guilty of contributory negligence.

We have said that the tracks of a railroad are of themselves a warning of danger, and that a person going upon the tracks is bound to listen and keep a lookout in each direction for approaching trains. *C. & O. Ry. Co. v. Rogers' Adm'x*, 100 Va. 324, 41 S. E. 732; *Humphreys' Adm'x v. Valley R. Co.*, 100 Va. 749, 42 S. E. 882.

It is difficult to get a clear-cut conception of the situation at the moment when the train came into contact with Savage; But, taking his own statement of the circumstances attending the accident, and it appears that he looked up and down the track before getting upon it, and then neither looked nor listened afterwards. He could not be brought to say how long he had been upon the track, nor his precise position upon the track, nor how far he had walked after getting upon the track before he was struck. He uses with respect to all these circumstances vague and indefinite terms. Some of his witnesses say that he had moved only eight or ten feet when he was struck, and that immediately upon his stepping upon the track they saw that the accident was inevitable. It may be that, had the engineer applied the brakes at the moment he came in sight of Savage upon the track, the accident could have been avoided. But such was not his duty. Seeing a man upon the track in the apparent possession of all his faculties, the engineer had a right to presume that he would exercise reasonable care for his own protection. A step or two would have placed Savage in a position of safety. The duty devolved upon the engineer to stop the train only when he saw that Savage was in danger; that is to say, when he saw, or ought to have seen, that Savage was him-

Rohloff v. Fair Haven & W. R. Co

self unconscious of his peril, and would take no measures for his own protection. This proposition has been decided in numerous cases by this court.

In *N. & W. R. Co. v. Haran's Adm'r*, 83 Ga. 554, 8 S. E. 251, it is said that: "If the person seen upon the track is an adult, and apparently in the possession of his or her faculties, the company has a right to presume that he will exercise his senses and remove himself from his dangerous position; and if he fails to do so, and is injured, the fault is his own, and there is, in the absence of willful negligence on its part, no remedy against the company for the results of an injury brought upon him by his own recklessness." *Tyler, Rec'r, v. Sites*, 90 Va. 539, 19 S. E. 174.

In *Rangeley v. Southern Ry. Co.*, 95 Va. 715, 30 S. E. 386, it is held that a railroad company has the right to assume that a grown person seen on its track would get out of the way of an approaching train, and the company is not liable unless it is shown that after the company, in the exercise of ordinary care, could have discovered that he was not going to get off the track, it could have avoided the injury.

In this case Savage looked and listened before he went upon the track, and gave no further heed to the possible peril he incurred in walking upon the track. Indeed, the evidence tends to show that his attention was diverted, and given not to caring for his own safety, as a reasonably prudent person in his situation should have done, but was at the moment directed to some boys whom he saw playing in the vicinity. This was certainly negligence upon his part, and there is no evidence tending to show that after the discovery by the railroad company, not of his position, but of his peril, it omitted to do anything within its power to avert the accident. Under these circumstances, we are bound to hold, upon the authority of the cases cited, that this unfortunate boy was the author of his own injuries.

The judgment of the circuit court must be affirmed.

ROHLOFF v. FAIR HAVEN & W. R. CO.

(Supreme Court of Errors of Connecticut, June 14, 1904.)

[58 Atl. Rep. S.]

Children—Contributory Negligence.*

A child about eight years of age may be guilty of contributory negligence precluding a recovery for injuries received.

Same—Same—Accident on Street Car Track—Liability.

Where, in an action against a street railway company for running over a child about eight years old, defendant proved that the child was guilty of contributory negligence in running in front of an approach-

*As to whether young children can be chargeable with contributory negligence, see foot-note appended to *O'Brien v. Wisconsin Cent. Ry. Co.* (Wis.), 9 R. R. 463, 32 Am. & Eng. R. Cas., N. S., 463, where all the preceding authorities in this series are collected.

Rohloff v. Fair Haven & W. R. Co

ing car, plaintiff, in the absence of proof that the injury was wantonly inflicted, could not recover substantial damages.

Care Required of Children.†

The defense of contributory negligence on the part of a child about eight years of age is not established by proof that the child failed to act with the prudence required of an adult under the circumstances, but it must be shown that he failed to exercise the care reasonably to be expected of children of similar age and experience under the circumstances.

Appeal—Review.

Findings on questions of fact are not reviewable on appeal.

Care Due to Avoid Injuring Children.‡

The same degree of care is required toward infants as toward adults, but the conduct which comes up to that degree of care when exercised toward adults may fall short of it when exercised toward infants under the same circumstances.

Appeal from Superior Court, New Haven County; John M. Thayer, Judge.

Action by Victor Rohloff, administrator of George R. Rohloff, deceased, against the Fair Haven & Westville Railroad Company. From a judgment for nominal damages, plaintiff appeals. Affirmed.

David E. Fitzgerald and Walter J. Walsh, for appellant.

George D. Watrous, Harry G. Day, and Henry H. Townsend, for appellee.

HALL, J. The following are, in substance, the facts found by the trial court: On the 29th of September, 1902, the plaintiff's intestate, George Rohloff, who was about 8½ years of age, was going westerly on the northerly sidewalk of Chapel street, in New Haven, on his way to school, in company with his two sisters—one (Henrietta) older and the other younger than he—and several other children. When they were about 150 feet from Olive street, toward which they were going, Henrietta ran diagonally across Chapel toward Olive street to meet another girl on the south side of Chapel street, and, as she reached that sidewalk, called to her brother George to follow her. He at once ran into the street from behind a tree near the curb, and started to cross the

†As to the degree of care required of children for their own protection, see foot-note appended to *Mitchell v. Illinois Cent. R. Co. (La.)*, 9 R. R. R. 240, 32 Am. & Eng. R. Cas., N. S., 240, where all the preceding authorities in this series are collected; *Dubiver v. City & S. Ry. Co. (Ore.)*, 10 R. R. R. 660, 33 Am. & Eng. R. Cas., N. S., 660 (it cannot be held, as matter of law, that because a minor is sui juris he should have exercised the same degree of prudence and judgment as an adult), foot-note appended to *Parker v. Washington Electric St. Ry. Co. (Pa.)*, 11 R. R. R. 610, 34 Am. & Eng. R. Cas., N. S., 610; foot-notes appended to *Cleveland, etc., Ry. Co. v. Miles (Ind.)*, 11 R. R. R. 536, 34 Am. & Eng. R. Cas., N. S., 536.

‡As to the care due children on railroad tracks or premises, see foot-note appended to *Louisville & N. R. Co. v. Logsdon's Adm'r (Ky.)*, 12 R. R. R. 637, 35 Am. & Eng. R. Cas., N. S., 637; *Jett v. Central Elec. Ry. Co. (Mo.)*, 11 R. R. R. 227, 34 Am. & Eng. R. Cas., N. S., 227; *Forrestal v. Milwaukee Elec. Ry. & L. Co. (Wis.)*, 11 R. R. R. 814, 34 Am. & Eng. R. Cas., N. S., 814.

street, running a little westerly from the direct line across, and running in front of the defendant's street car, which was going westerly on Chapel street. As the boy reached the north rail of defendant's northerly track, which north rail was 13 feet south from the north curb of Chapel street, he was struck by the car, "and thrown to the ground just north of said rail, so that the end of the brake beam, axle, or fender rolled him over, and dragged him a few feet, causing injuries from which he died a few days after." Chapel street at the place of the accident is about 35 feet wide. When the plaintiff's intestate started to cross the street, the car was 25 or 30 feet easterly of the point where he was struck, and was moving at a lawful rate of speed, of about 8 or 10 miles an hour. There was no cross-walk at the place of the accident. The motorman managing the car was inexperienced, having been first employed by the defendant about three months before the accident, and at the time of the accident was serving in the place of a regular motorman on this route. When he saw the group of children, he threw off the power, so as to have the car under better control, but did not apply the brakes, nor drop the fender, nor sound the gong. He did not see Henrietta as she ran across the street, nor did he know of George's intention to cross the street until he saw him in the street near the front of the car. There was nothing along the curb line, excepting the tree, to prevent him from seeing the children two or three hundred feet ahead of him, nor any person or vehicle in the street to prevent him from seeing the plaintiff's intestate, or to prevent the latter from seeing and hearing the approaching car. In the language of the finding, "when he saw the boy spring into the street in front of the car, he (the motorman) did what was proper to do, and all that could be done, before the boy was struck and injured, to avoid the accident." "After the motorman observed the boy in the street, there was not time to reverse the power and drop the fender before the boy was struck." The trial court finds that the car was equipped with a proper fender; that its appliances were in good working order; that the accident was not due to the failure to drop the fender; that the motorman "was not negligent in failing to further check the car, or in failing to ring his gong, or to drop the fender before the accident"; and that the injuries to the plaintiff's intestate were caused by his own negligence, and not by the negligence of the defendant.

The record presents no questions of evidence. Unless, therefore, the trial court, in so determining the questions of the defendant's negligence, and the contributory negligence of plaintiff's intestate, has failed to apply to the conduct of one of them the proper legal test, or unless the conclusions of the trial court upon these subjects are inconsistent, in law or reason, with some of the subordinate facts found, the decision of that court upon the questions of negligence is final.

The allegations in the complaint of care upon the part of the plaintiff's intestate, and of negligence upon the part of the defendant, which the latter assumed the burden of disproving upon the hearing in damages, are that the plaintiff's intestate was in the exercise of due care; that the defendant's car was not provided with a proper fender, and was moving at an unlawful and unreasonable rate of speed; that the motorman was careless, in not seeing the child, George Rohloff, as he was crossing the street, in not ringing the gong, in not dropping the fender, in not having the car under proper control, and in not stopping it in time to prevent the accident.

The claim made by the plaintiff at the trial that a child of the age of the plaintiff's intestate was, as a matter of law, incapable of contributory negligence, was properly overruled by the trial court. In *Daley v. Norwisch & W. R. Co.*, 26 Conn. 591, 597, 68 Am. Dec. 413, in which the question whether a child less than 3 years old, who was injured while on the defendant's railroad track, was guilty of contributory negligence, was submitted to the jury, this court said: "It might almost have been assumed, as matter of law, that the plaintiff was guilty of no neglect or culpability whatever." In *Brenan v. Fair Haven & W. R. Co.*, 45 Conn. 284, 299, 29 Am. Rep. 679, it was held that the trial court properly found a boy 10 years of age not guilty of contributory negligence, who in getting off a car used such care, caution, and prudence as could be expected from a person of his age, although the same conduct might have been negligence in an older person. In *Birge v. Gardner*, 19 Conn. 507, 50 Am. Dec. 261, where a child between 6 and 7 years old was injured by the fall of a gate, the question of contributory negligence was submitted to the jury in the trial court. This court said "that while it might, perhaps, have been going too far for the court to have said, as a matter of law, that a child of that age could not be so blameworthy as to excuse the defendant, the court would not say that such cases might not be imagined or might not sometimes occur." In *Nolan v. New York, N. H. & H. R. Co.*, 53 Conn. 461, 478, 4 Atl. 106, it was said that it was a mistake if the trial court decided, as a legal question, that a plaintiff 7 years of age was not guilty of contributory negligence in attempting to cross the defendant's railroad track. In *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548, 559, the plaintiff, who was 10 years of age, was injured by the machinery of a mill in which he was an operative. It was held that, if the question whether he was mature enough to appreciate the hazards of his employment was important, it was a question of fact for the jury. Although in the case at bar the child injured was but 8½ years old, the plaintiff, in the absence of any allegation or proof that the injury was produced by any wanton or intentional act of the defendant, was not entitled to recover sub-

stantial damages, if, upon the hearing in damages, the defendant proved that the failure of the child, George, to exercise reasonable care, under all the circumstances, essentially contributed to cause his injury.

The fact that the carelessness of the plaintiff's intestate which so contributed to cause the accident was that of a child 8½ years of age did not, as matter of law, deprive the railroad company of the defense of contributory negligence. But that defense was not established by bare proof that the child, George, failed to act with that prudence and foresight which would have been required of an adult under similar circumstances. The term "ordinary or reasonable care," applied to the conduct of a child of the age of the plaintiff's estate, means such care as may reasonably be expected of children of similar age, judgment, and experience under similar circumstances. Cases above cited, and *Sioux City, etc., R. Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745; *Lynch v. Smith*, 104 Mass. 52, 6 Am. Rep. 188; *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645; *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282; *Morey v. Gloucester St. Ry. Co.*, 171 Mass. 164, 50 N. E. 530. That the trial court applied this test to the conduct of the child, George, and that it reached a correct conclusion upon the question of contributory negligence, as one fact, we have no occasion to question from the finding before us.

The conclusion thus properly reached by the court, that the injuries were caused by the negligence of the child, George Rohloff, is decisive of the case, since it forbids a recovery of more than nominal damages, even if the record shows that the defendant was also negligent. But we discover no error in the rulings and conclusions of the court upon the question of defendant's negligence. The question of the rate of speed of the car; whether it was equipped with a proper fender; what the motorman should have done in order to have his car under control after he saw the children on the street, and what he ought to have anticipated that the children might do; whether, after seeing the boy in the street, and before he was struck, he could have reversed the power and dropped the fender; and whether during that time he did all that could have been done to avert the accident—were wholly questions of fact, the decision of the trial court upon which we cannot review upon this appeal. The question of defendant's negligence was one of reasonable care and diligence upon the part of the motorman under all the circumstances. The law lays down no such fixed and definite rule as to the acts required to be performed by a motorman in the management of an electric car under such circumstances as will warrant us in saying, as a matter of law, that the motorman's conduct was not reasonable in the present case.

There was no allegation in the complaint that the defend-

Ihrig v. Erie R. Co

ant failed to employ a competent motorman, nor does it appear that the inexperience of the motorman in any way contributed to cause the accident.

Upon the trial of the case the plaintiff made, among others, this claim of law: "When a duty exists, the degree of care required by law toward infants is greater than that required toward adults." This language does not correctly state the law as held in *Nolan v. New York, N. H. & H. R. Co.*, 53 Conn. 461, 474, 4 Atl. 106, 110, cited by plaintiff in support of this claim. In regard to the claim the trial court correctly ruled "that the same degree of care is required toward infants as toward adults, but that conduct which comes up to that degree of care when exercised toward adults may fall short of it when exercised toward infants under the same circumstances."

There is no error. The other Judges concurred.

IHRIG v. ERIE R. CO.

(Supreme Court of Pennsylvania, Dec. 31, 1904.)

[59 Atl. Rep. 686.]

Accident at Crossing—Stop, Look, and Listen.*

The rule of law is absolute that a failure to stop, look, and listen before going on a railroad track is negligence.

Same—Contributory Negligence.

In an action to recover for injuries at a railroad crossing, evidence held to show plaintiff guilty of contributory negligence.

Appeal from Court of Common Pleas, Venango County.

Action by George W. Ihrig against the Erie Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, POTTER, and THOMPSON, JJ.

Robert F. Glenn and Peter M. Speer, for appellant.

Wm. H. Forbes and J. S. Carmichael, for appellee.

FELL, J. The plaintiff, riding in a one-horse buggy, with the side curtains down, without stopping and looking for the approach of a train, drove at a slow trot on the tracks of the defendant company in the city of Franklin as the safety gates were coming down. These gates were 25 feet apart. The first struck the top of the buggy, and the second was fully down when his horse reached it. The buggy was struck by a shifting engine on the second track almost immediately after the horse stopped. The time between the

*See foot-notes appended to *West v. Northern Pac. Ry. Co. (N. Dak.)*, 12 R. R. R. 655, 35 Am. & Eng. R. Cas., N. S., 655; foot-note appended to *Cromley v. Pennsylvania R. Co. (Pa.)*, 12 R. R. R. 666, 35 Am. & Eng. R. Cas., N. S., 666.

stopping of the horse and the collision was estimated by the plaintiff as a second or a second and a half, by one of the witnesses as a quarter of a minute, and by another witness the collision was said to have occurred immediately after the stopping. Seventy-four feet from the crossing the plaintiff was passed by a mail carrier in an open cutter. When this man was at the edge of the tracks, and 30 or 40 feet in advance of the plaintiff, the flagman gave a signal to come on. He went on, and crossed in safety. The plaintiff was unable to say that the signal had been intended for him, and only that it was given in his direction. At any point within 20 feet of the tracks the plaintiff had a clear view of them for 700 feet in the direction from which the engine came. The gates were being lowered as he drove on the crossing, but he did not observe them until the horse was on the first track.

The appellant's first contention is that the circumstances of the case relieve him from the charge of contributory negligence; his second, that his failing to stop did not contribute to his injury because he could have escaped the danger in which he was placed if the flagman had not lowered the gates. In support of the first it is argued that the rule that a traveler, before crossing the tracks of a steam railroad, must stop, look, and listen for the approach of a train, is not a fixed rule, to be observed under all circumstances, but only a reasonable requirement, the nonobservance of which, while prima facie evidence of negligence, may be explained and excused. That this proposition cannot be sustained, under the decisions, is clear. There is no brake or wavering in the line of cases extending back nearly 40 years, which hold that the rule is inflexible and admits of no exceptions, and that a failure to observe it is not merely evidence of negligence, but is negligence per se. There has been no clearer statement of the rule than that made by the present Chief Justice in *Aiken v. Pennsylvania Railroad Co.*, 130 Pa. 380, 18 Atl. 619, 17 Am. St. Rep. 775: "It is not a rule of evidence, but a rule of law, peremptory, absolute, and unbending; and the jury can never be permitted to ignore it, to evade it, or to pare it away by distinctions and exceptions. That the failure to stop is not merely evidence of negligence, but negligence per se, has been said so often, for *North Pennsylvania Railroad Co. v. Heileman*, 49 Pa. 60, 88 Am. Dec. 482, to *Greenwood v. Phila., etc., Railroad Co.*, 124 Pa. 572, 17 Atl. 188, 3 L. R. A. 44, 10 Am. St. Rep. 614, that to cite the cases would be wearisome." In *Greenwood v. Railroad Co.*, 124 Pa. 572, 17 Atl. 188, 3 L. R. A. 44, 10 Am. St. Rep. 614, and *Lake Shore, etc., Railway Co. v. Frantz*, 127 Pa. 297, 18 Atl. 22, 4 L. R. A. 389, it was said that the neglect of the company did not relieve the plaintiff from the performance of his duty, and the rule was applied where reliance had been placed on the fact that the safety gates at a crossing were up. In *Fennell v. Harris*, 184 Pa. 578, 39 Atl. 491, and

Sentell v. Southern Ry

Ayers v. Pittsburg, etc., Railway Co., 201 Pa. 124, 50 Atl. 958, and other cases, in which the action of a watchman at a crossing in a measure excused what would otherwise have been negligence on the part of the plaintiff, and duty to stop, look, and listen had been fully performed. In *Mendenhall v. Philadelphia, etc., Railroad Co.*, 202 Pa. 427, 51 Atl. 1028, the plaintiff had safely crossed the tracks, and the accident was caused by a new and unexpected danger, not connected with the running of the trains. His negligence, not having contributed to the accident, was said to be immaterial.

The second ground is equally untenable. The direct and immediate cause of the plaintiff's injury was his reckless disregard of a rule of common prudence and of law. From the first danger he never escaped, and there was no intervening cause disconnected with it. Nor can it be said that he was lured into a position of peril, and kept there by the gates. He got into danger though his negligence in assuming that the way was safe for him because a signal had been given when another driver was at the edge of the tracks, 30 or 40 feet in advance. That he was shut in was not the fault of the flagman, who had no knowledge of his attempt to cross, but the inevitable result of his driving under the descending gates.

The judgment is affirmed.

SENTELL v. SOUTHERN RY.

(Supreme Court of South Carolina, Nov. 23, 1904.)

[49 S. E. Rep. 215.]

Witnesses—Impeachment—Agency—Res Gestæ.

An agent of a party may be contradicted, after foundation laid, by showing that at another time he made statements as to the matters in issue in contradiction of his testimony, though such statements were no part of the *res gestæ*.

Railroads—Duty to Licensees.*

Plaintiff's decedent was killed while sitting on the end of a cross-tie, with his head in his hands, and his feet in a path along the track, which had been used as a path for many years without objection by the railroad company. He could have been seen by the engineer for some distance before he was struck: *held* proper to submit to the jury the question whether the deceased was a licensee, so that the engineer was bound to keep a lookout as to him.

Instructions.

A charge of a court, based upon a hypothetical statement of facts, is

*As to the care due licensees and trespassers on railroad tracks, see foot-notes appended to *Rawitzer v. St. Paul City Ry. Co.* (Minn.), 13 R. R. 91, 36 Am. & Eng. R. Cas., N. S., 91; foot-note appended to *McConkey v. Oregon R. & Nav. Co.* (Wash.), 12 R. R. 267, 35 Am. & Eng. R. Cas., N. S., 267; foot-note appended to *Gregory v. Louisville & N. R. Co.* (Ky.), 12 R. R. 293, 35 Am. & Eng. R. Cas., N. S., 293; foot-notes appended to *Hortenstine v. Virginia-Carolina Ry. Co.* (Va.), 12 R. R. 616, 35 Am. & Eng. R. Cas., N. S., 616.

Sentell v. Southern Ry

not a violation of the constitutional provision against a charge on the facts.

Appeal from Common Pleas Circuit of Edgefield County; Joseph A. McCullough, Special Judge.

Action by Rena A. Sentell, administratrix of James C. Sentell, against the Southern Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

E. M. Thomson and J. W. DeVore, for appellant.

J. W. Thurmond, Wm. P. Calhoun, and Croft & Tillman, for respondent.

POPE, C. J. James C. Sentell, by occupation a carpenter, aged about 64 years, while sitting upon a cross-tie of the Southern Railway Company, on the 28th day of May, 1900, in the county of Aiken, S. C., was struck by a railway train, to wit, a passenger train of defendant's railway, on its way from Augusta, state of Georgia, through the city of Columbia, S. C., on its way to the north, and instantly killed. After the plaintiff was appointed the administratrix of the estate of the said James C. Sentell, deceased, her deceased husband, she brought her action against the defendant to recover for herself and her three children the sum of \$1,999 as damages, because she alleged that her said husband's death had been caused by the negligence of defendant. The action was once before this court on the question if the right of the court of common pleas to amend the summons and complaint by striking out the word "the" from the summons and complaint; this court holding that such amendment was legitimately allowed. 67 S. C. 229, 45 S. E. 155. After its return to the circuit court, and after the amendments were made and the defendant had filed its amended answer, the action came on for trial on its merits before Special Judge Joseph A. McCullough and a jury. The verdict of the jury was in favor of the plaintiff in her representative capacity for \$1,999. When judgment was entered thereupon, the defendant appealed to this court on the following grounds, to wit:

"(1) Excepts because the presiding judge erred in allowing plaintiff's attorney, over the defendant's objection, to ask J. T. McPherson, the engineer, and a witness for defendant, the following question: 'Did you not say to, or in the presence of, Barton, on Broad street, in the city of Augusta, December after the killing, in substance the following: "I saw the man on the track when I first turned the curve. When I passed the dip, was looking for him to get up;"' and in allowing the witness to answer the same; and further erred in allowing the plaintiff to put up Barton, a witness for plaintiff, to contradict the said J. T. McPherson—whereas, the said testimony was incompetent and irrelevant, being no part of the res gestæ, and not being within the scope of the said engineer's agency, and was further incompetent for the purpose of contradiction.

Sentell v. Southern Ry

"(2) Excepts because the presiding judge erred in overruling the defendant's motion for a nonsuit, which was made upon the following grounds: (1) There is no testimony tending to show such negligence on the part of the defendant as would make it liable for killing the deceased; nor is there any testimony tending to show any negligence of the defendant in the operation of its locomotive and train; no evidence that the engineer saw deceased was in such a position that he was unable to take care of himself in time for the engineer to have stopped the train. (2) And, further, that all the evidence for the plaintiff is capable of but one inference—but one inference can be drawn from all the testimony—and that is that the deceased came to his death by reason of his own negligence in going upon defendant's track under the circumstances as detailed by plaintiff's witnesses.

"(3) Excepts because the presiding judge erred in charging the jury as follows: 'So, then, you will ascertain, first, what relation did the intestate sustain towards this railroad company, because, in order to determine whether or not the railroad company owed the intestate any duty, and whether or not that duty was reached, depends upon the relation the intestate stood towards the railroad company. Now, what was that? You are to ask yourselves that question, and answer in the light of the testimony, was it that of a trespasser?' The error consisting in leaving it to the jury to determine what relation the deceased, Sentell, sustained towards the defendant company; it being submitted that it was the duty of the court itself to determine and charge the jury what such relation was, especially in this case, where the facts were undisputed that the deceased was sitting upon the end of a cross-tie on defendant's track, where he had no legal right to be, and was therefore a trespasser.

"(4) Excepts because the presiding judge erred in charging the jury as follows: 'There is another relationship, what I call "license," and I do that in order that you may draw the distinction. I charge you that the definition of licensee, as I shall endeavor to give you, is this: where one goes upon the track, not as a trespasser, but upon some warrant or authority by knowledge, acquiescence of the railroad, and by permission of the railroad, either expressed or implied. Now, if the railroad company, or the owner of the premises, knew—can't you see, knew—that people were accustomed to go upon these premises, and acquiesced in that custom, why, then, a greater degree of care would be due such person than a naked trespasser. The law says, whenever people are accustomed to going upon my premises, I shall take care not to expose them to extraordinary hazardous risk. If they are licensees, they take my premises as they find them. I am not required to enter into elaborate preparation, but if there are hazards there that they don't know I should warn them.' The error being: (1) Such charge was inapplicable, and to

Sentell v. Southern Ry

defendant's prejudice, because under the undisputed evidence the deceased was a trespasser, and only the law with reference to the duty of the defendant towards a trespasser should have been declared. (2) Under the undisputed evidence that the deceased was sitting upon the end of a cross-tie on the defendant's railway track it was error to charge that he could acquire any legal right by license to occupy such place. Such right cannot be legally acquired. (3) The deceased could not have been a licensee, because there was no evidence showing knowledge, acquiescence, or permission on the part of the railroad company, which would entitle him to sit upon the end of a cross-tie on defendant's track.

"(5) Excepts because the presiding judge erred in charging the jury as follows: 'You have heard a great deal about "lookout." What does that mean—the duty of the railroad to keep a lookout? That means this: Take all the facts and circumstances under consideration, would a man of ordinary prudence and reason be expected to keep a lookout under those circumstances; in other words, take into consideration the character of the country, take into consideration the surrounding circumstances, and ask yourself the question, would ordinary care and foresight and prudence require a reasonable lookout to be kept under those circumstances? Suppose a reasonable lookout had been kept, was it negligence in not seeing this particular man; would an engineer of ordinary foresight, ordinary reason and prudence, if he had been keeping a reasonable lookout, have discovered the presence of this man, if he was upon the track, in time to have stopped the train, and thereby avoid the injury? In determining that take into consideration the surrounding circumstances; take a man of ordinary firmness and reason, a man who has other duties to perform, and say whether or not such a man, by the exercise of ordinary firmness and reason, would have discovered this man upon the track, if he was there, in time to have stopped his train and thereby avoid collision?' The error being: The undisputed evidence showing the deceased to be a trespasser, the defendant was not required to keep a lookout for him; no duty arose until his presence and danger were known and appreciated, and then it was not to wantonly or willfully injure him. The charge exacted more than the law required.

"(6) Excepts because the presiding judge erred in charging the jury plaintiff's second request, which was as follows: 'If the jury find from the evidence that the deceased, James Sentell, was killed by a train on defendant's railroad, and at such time he was in apparently helpless condition; and if they further find that at the place of such killing, the public, by the permission of the railway company, had been accustomed without objection from the defendant to travel for more than twenty years—then it would not excuse the defendant simply to show that their agent in charge of said

Sentell v. Southern Ry

train did not see the deceased in time to avoid the killing, for under such circumstances it may be the duty of the defendant to keep a reasonable outlook at such places to discover any apparently helpless person who may be upon the track.' The errors being the same as specified under exception 4; and, further, it was a charge upon the facts, in violation of article 5, § 26, of the Constitution of this state.

"(7) Excepts because the presiding judge erred in charging the jury plaintiff's fourth request, which was as follows: 'If persons have long been accustomed to use the track of a company for a passageway at certain localities, the company is charged with notice of such usage, and is under obligation to exercise reasonable care in keeping lookout at such places, among other things, for apparently helpless persons.' The errors being the same as specified under exception 4."

1. We think the presiding judge did not fail in the discharge of his duty, as here pointed out. The witness J. T. McPherson was defendant's witness. He had been examined with great care by its counsel. His testimony was important to the defendant. On cross-examination he was subjected to this test, namely, had he ever made an admission of a state of facts in contradiction of his testimony. The effect was, not to give testimony as to the *res gestæ* of the killing of James C. Sentell, but it was to discredit his testimony by showing that J. T. McPherson had made a statement at variance with his sworn statement. In the case of *Mason v. Southern Railway*, 58 S. C. 75, 36 S. E. 440, 53 L. R. A. 913, 79 Am. St. Rep. 826: "When the witness Pettus was on the stand, he was asked if he did not say to Mason, the father of the child, when the train backed to the place where the collision took place, at the time Mason climbed up in the cab, that he thought it was a dog or a chicken on the track, and that he did not have time to stop then. He answered, 'No.' The foundation was properly laid for contradicting the witness, and the testimony was at least admissible for that purpose." It must be borne in mind that the integrity of the witness alone is in the balance. It is always important that the witness should speak the same words, so far as his meaning on the accuracy of the statement are concerned, in regard to occurrences which he details. If he has made a statement at another time inconsistent with his testimony on the trial, it is perfectly competent on cross-examination to ask him if he did not at a certain time and place make to Mr. Blank a different statement, carefully stating what the statement was. The contradiction was necessarily made by producing Mr. Barton, the gentlemen to whom Mr. McPherson made his statement, in Augusta, Ga. It is not contended that such contradictory statement is worth anything except to impeach McPherson's character for truthfulness. This exception is overruled.

Sentell v. Southern Ry

2. This exception relates to the refusal of the acting circuit judge to grant the motion for nonsuit as made by defendant. We have examined the testimony as affected by the first subdivision of this exception. We find that there was some material testimony introduced by the plaintiff tending to show negligence by the defendant. Whether the engineer saw, or was bound to see, James C. Sentell in his position alongside of defendant's track, had some support, even if Sentell was a naked trespasser.

3. It makes no difference if the trend of the testimony was that Sentell was a naked trespasser, the defendant owed him a duty, viz., that he should not be treated by defendant without some regard to the dictates of humanity. There was positive testimony that the engineer could have seen Mr. Sentell in plenty of time to have stopped the train before reaching him, and thus have saved his life. All in all, there was testimony tending to show negligence. Therefore the special judge ought to have refused the motion for nonsuit.

4. The circuit judge properly left the attitude of James C. Sentell to the defendant to the jury. Granted that the deceased was sitting on the end of a cross-tie of defendant's track, it was in testimony that for more than 20 years the defendant had allowed passers to walk alongside its track. The people had been treated with great courtesy by the railroad, but, having treated them with this kindness for more than 20 years, the railroad company must treat them with care. Not that these foot travelers could claim a right to occupy the track as against the railroad's use of this property. This court, in the case of *Jones v. R. R. Co.*, 61 S. C. 556, 39 S. E. 758, made these remarks in discussing a nonsuit, and, while we have already passed upon the nonsuit in this appeal, yet the language of Mr. Justice Jones in the case we have just cited is well worth a repetition here: "The fourth exception alleges error in the refusal of the motion for nonsuit, which motion was based on the ground that the evidence showed that the plaintiff's intestate was a trespasser when injured, and there was no evidence of gross or willful misconduct of the defendant in the management of its train. The general rule undoubtedly is that a railroad company owes no duty to a bald trespasser on its track, except not to do him any wanton or willful injury. *Smalley v. Southern Ry. Co.*, 57 S. C. 243, 35 S. E. 489, and authorities therein cited. Ordinarily, the mere failure to keep a lookout for adult trespassers that may be on the track is not evidence of negligence to the trespasser, because negligence involves a breach of duty to the injured person, and the railroad company owes no such duty to the adult trespasser. It is the trespasser's duty to look out for himself, and to give the railroad company a clear track by getting out of the way. If, however, the servants of the railroad company should discover a trespasser upon the track, and should then fail to observe or

Sentell v. Southern Ry

use ordinary care, under the circumstances, to avoid running him down, this would be evidence from which a jury might infer that the injury was the result not of mere inadvertence, but of a conscious failure to observe due care, or of wantonness or willfulness." (Italics ours.) "In this case, however, the complaint alleged that the track where the injury occurred 'traversed a populous part of the city of Anderson, and is much frequented by people passing to and fro along said railroad, which fact was well known to the defendant and its agents and servants and employees,' and there was some evidence tending to establish such allegations which made it proper to submit the case to the jury." (These latter allegations were in the complaint in the case at bar, and there was some testimony tending to establish such allegations, which made it proper to submit the case to the jury.) "If such allegations be true, then the circumstances were such as to call for a higher degree of care to avoid injury than if the plaintiff's intestate was a bald trespasser. Even though the use of the track by the public as a walkway was not for such length of time nor of such character as to give a legal right to so use the track; and even though the evidence fell short of showing any positive consent of such use by the company, yet, if there was evidence tending to show knowledge of an acquiescence in such use without protest, such evidence would tend to show that the railroad company had much reason to expect the presence of persons on the track, who were there not as bald trespassers, but using it with the knowledge and acquiescence of the (railroad) company. Under such circumstances it would be the duty of the railroad company to keep a reasonable lookout, or to give warning of the approach of the train, or generally to observe ordinary care, under the circumstances, to avoid injury." We have reproduced so much of the case of *Jones v. Railroad*, supra, in order to show that the circuit judge in the case at bar has followed the principles recognized and approved in the *Jones Case*, supra, and hence there was no failure on his part when he did not assume to decide the question of trespasser, but properly submitted it to the jury. This exception is overruled.

5. We think, under the authority of *Jones v. Railroad*, supra, the presiding judge was correct in charging the jury as to a licensee. The trend of the testimony was to show that for more than 20 years the railroad company had acquiesced in the use of the walk alongside of its track, and certainly had not forbidden its use by pedestrians; also the feet of the intestate were on the path of that walkway when he was stricken by the train of defendant, though it is true he was seated on a cross-tie of the track. When the intestate, Mrs. Jones, was killed, in *Jones v. R. R. Co.*, supra, she was walking on the trestle, and yet the charge of the circuit judge called the attention of the jury to the fact that under the con-

Powell v. Nevada, C. & O. Ry

sent, either express or implied, she was there as a licensee. This exception is overruled.

6. We do not think the presiding judge erred in speaking of a lookout by telling the jury what it meant, and under what circumstances a defendant should exercise this duty. Did not ordinary care require this duty of defendant in its acquiescence in the use of its track by pedestrians? Again, we refer to the extracts we have made from the case of *Jones v. R. R. Co.*, supra. This exception is overruled.

7. This exception in large measure has been passed upon in our views touching the third and fourth exceptions. No harm—legal harm—resulted to defendant from the charge of the judge, based upon a hypothetical statement. There was no violation of the mandate of the Constitution forbidding judges charging upon the facts. See *Jenkins v. Railway Co.*, 58 S. C. 373, 36 S. E. 703.

8. We do not think there was any error in the presiding judge in charging plaintiff's fourth request. We have already passed upon these matters, especially in disposing of appellant's fourth ground of appeal. It is overruled.

It is the judgment of this court that the judgment of the circuit court is affirmed.

WOODS, J. (concurring). In concurring in the opinion of the Chief Justice, I do not understand it is held to be the duty of a railroad company to stop its train because the engineer sees a man sitting on a cross-tie in front of the train, even at a place where the public are accustomed to travel with the knowledge and implied consent of the railroad company. Ordinarily, the engineer may well assume that such person is in possession of his senses, and will get out of the way of the train. But in this case there was some evidence that the deceased was sitting bent over, with his face in his hands, in an attitude indicative of a helpless physical condition, and that by proper watchfulness the engineer would have observed the significant posture, and been put on notice of the helplessness of the man he was approaching in time to stop the train. Whether this helpless condition of the deceased was due to drunkenness, which would warrant a finding of contributory negligence, or to a sudden attack of illness, was, under the evidence, a question of fact for the jury.

POWELL, *v.* NEVADA, C. & O. RY.

(Supreme Court of Nevada, Dec. 24, 1904.)

[78 Pac. Rep. 978.]

Personal Injuries—Damages—Mental Suffering.

There is no fixed rule for the measure of damages for personal injuries, especially for mental anguish apart from physical suffering, and much must be left to the jury under proper instructions.

Powell v. Nevada, C. & O. Ry**Same—Excessive Verdict.**

While, in an action for personal injuries, testimony for defendant tended to minimize his injuries, there was evidence that plaintiff's fall caused a concussion of the brain and an atrophic condition of the muscles of the right arm, that his mental faculties became impaired, and he was dull and appeared distracted, and one witness described his condition as pitiful: *held*, that a verdict for \$6,000 was not so excessive as to indicate passion or prejudice.

Frightening Teams—Evidence—Similar Accidents.*

In an action for personal injuries caused by a fall from a cart when plaintiff's horse was frightened by a steam whistle in defendant's railroad shops, evidence that a team had been frightened thereby on another occasion was admissible to show the dangerous character of the whistle at the place it was used.

Same—Necessity of Blowing Whistle—Expert Testimony.

Questions addressed to master mechanics as to whether it was necessary and convenient for defendant to sound the whistle at stated hours to notify employees in the shops to commence and quit work were properly excluded, as they related to a subject of common knowledge and experience.

Same—Defenses—Power to Maintain Necessary Buildings.

The power of railroad companies under Comp. Laws, § 988, subd. 10, "to erect and maintain all necessary and convenient buildings, stations, depots, and fixtures and machinery for the accommodation and use of their passengers, freight and business," etc., does not protect a company in such a use of a steam whistle in its shops as to frighten horses and thereby injure others.

Appeal from District Court, Washoe County; B. F. Curler, Judge.

Action by Daniel Powell against the Nevada, California & Oregon Railway. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. **Affirmed.**

Dodge, Parker, Cheney, Massey & Smith, for appellant.
Torreyson and Summerfield, for respondent.

BELKNAP, C. J. Appellant, a railway corporation, had a steam whistle on its shops, six feet from the line of the street along which respondent was driving. His horse took fright at the sounding of the whistle, and ran away. Respondent was thrown out and injured. In an action to recover damages for the injury, a judgment was rendered for the sum of \$6,000. An appeal has been taken therefrom, and from an order denying a motion for a new trial, upon the ground, among others, of excessive damages appearing to have been given under the influence of passion or prejudice, and of insufficiency of the evidence. The complaint prays for a judgment of \$10,089.50. Of this sum \$5,000 is asked as damages for mental and physical suffering; \$5,000 for permanent partial loss and impairment of memory and permanent loss of the use of the right arm; and the remainder, \$89.50, for medical attendance, nursing, and similar expenses incurred. In an endeavor to analyze the verdict

*As to whether evidence of similar accident or acts of negligence are admissible, see foot-note appended to *Nelson v. Union R. Co.* (R. I.), 12 R. R. R. 633, 35 Am. & Eng. R. Cas., N. S., 633.

and determine the amount the jury may have apportioned as damages for mental and physical suffering and the amount for permanent injuries, appellant claims there was no material mental anguish or physical pain shown, and no permanent injuries, and that the verdict and judgment are excessive.

The evidence upon the part of respondent tended to show that he, accompanied by Mr. Smith, was driving a horse of ordinary gentleness, attached to a road cart, along Fourth street, in the city of Reno, upon the occasion stated; that upon approaching appellant's railway shops the steam whistle, which witness for plaintiff testified was of unusual shrillness, was blown, the horse became frightened, and, suddenly turning, upset the cart, throwing the men out and injuring respondent. His fall caused a concussion of the brain and an atrophic condition of the muscles of the right arm. His mental faculties which were fairly good before the accident, became impaired. He was dull, forgetful, appeared distracted, and, in the language of one of his witnesses, his condition was pitiful. Testimony on the part of appellant tended to minimize his injuries. It may be conceded that these are passages in the testimony of respondent himself that can be construed against a recovery, but upon the whole case we think the judgment should not be interfered with. The evidence touching mental anguish and physical suffering is not as satisfactory as that concerning permanent injuries. But in this class of cases there is no fixed rule for the measure of damages, especially for mental anguish apart from physical suffering. Much is left to the jury under proper instructions from the court. The amount of the judgment is not so excessive as to indicate passion or prejudice on the part of the jury, and the evidence is sufficient to support the verdict.

J. R. Eason, a witness introduced by respondent, was permitted to testify that on another occasion appellant's whistle had frightened a team which he was driving on Fourth street, and caused it to run away. The admission of this testimony is assigned as error, on the ground that it tended to introduce collateral issues, and thus mislead the jury from the matter directly in controversy. The evidence was introduced to show the dangerous character of the whistle at the place it was used. In *Dist. of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618, in a suit to recover damages from a fall caused by a defective sidewalk, it was held competent to show other like accidents whilst it was in the same condition. The court said: "They were proved simply as circumstances which, with other evidence, tended to show the dangerous condition of the sidewalk in its unguarded condition. The frequency of accidents at a particular place would seem to be good evidence of its dangerous character; at least, it is some evidence to that effect. * * * Here

the character of the place was one of the subjects of inquiry to which attention was called by the nature of the action and the pleadings, and the defendant should have been prepared to show its real character in the face of any proof bearing on that subject." In *Golden v. C., R. & Pac. Ry. Co.*, 84 Mo. App. 59, defendant, after repairing its bridge, left a pile of boards on the side of the highway. It frightened plaintiff's horses, and they ran away and injured her. Evidence was admitted that gentle horses had been frightened by the same pile of boards at the same place. The court said: "The evidence was offered to show the character of the object of complaint, and was not to try collateral matter. If leaving an object in the highway which is calculated to frighten horses is a wrong, and the question is made whether such object is so calculated, what better evidence can be had of that than actual experiment? The great weight of authority favors the ruling of the trial court." Evidence of this nature is not new in this state. In *Longabaugh v. V. & T. R. R. Co.*, 9 Nev. 271, in a suit against a railroad company for damages occasioned by setting fire to cord wood by one of its locomotives, it was held that previous fires in the same place caused by coals dropped from defendant's locomotive, and also of the emission at the same place of sparks of sufficient size to set fire to cord wood, was admissible.

Exception was taken to the exclusion of the answer to the question addressed to Mr. Meyers, the master mechanic of appellant, as to whether it was necessary and convenient for the appellant corporation to sound the whistle at stated hours for the purpose of notifying the employees in the shops to commence and quit work. The question was inadmissible. The subject was of common knowledge and experience, and it was for the jury, and not for the witness, to determine whether the whistle was convenient and necessary. Appellant is incorporated under the general laws providing for the incorporation of railroad companies. Section 971 et seq., *Cutting's Compilation*. Among its powers are: "Tenth—to erect and maintain all necessary and convenient buildings, stations, depots, and fixtures and machinery for the accommodation and use of their passengers, freight and business and to obtain and hold the lands and other property necessary therefor." Section 988. It is claimed that this provision protects appellants in the use of the whistle. A similar defense was made in *Knight v. Goodyear Co.*, 38 Conn. 442, 9 Am. Rep. 406. The court said: "Their right to use a whistle must be conceded, but, like all other rights, it must be so exercised as not to endanger and injure others. It is no answer to say that they did not erect or blow the whistle for any such purpose, or that they had no knowledge that it frightened horses, or that they did not suppose it was calculated to frighten them. These facts, if they existed, they were bound to know or anticipate. When a man exercises a

Central of Georgia Ry. Co. v. Bagley

particular right in a particular manner calculated to produce injury to another, he must be held to a knowledge of the possible or probable consequences of his act, and cannot be excused because he did not intend or expect those consequences. It is an elementary rule that every man must be presumed to intend the natural and necessary consequences of his acts, and there is nothing found in this case which will exempt the defendants from the operation of that rule."

We have examined the remaining exceptions, and find no error in them.

The judgment and order denying a motion for a new trial should be affirmed. It is so ordered.

FITZGERALD and TALBOT, JJ., concur.

CENTRAL OF GEORGIA RY. CO. v. BAGLEY et al.

(Supreme Court of Georgia, Jan. 28, 1905.)

[49 S. E. Rep. 780.]

Joint Ownership—Pleading.

An allegation in a petition by two plaintiffs that certain personalty therein described is "the property of petitioners" is, in effect, an averment that they are joint owners thereof; there being nothing in the petition to indicate several ownership by one or the other in any portion of the property.

Killing Stock—Negligence—Pleading.

That portion of the petition which contained the averment of negligence was sufficient as against the demurrer filed thereto.

Assignments of Error—Evidence.

The assignments of error on the admission of evidence were not well taken.

Witness—Credibility of Employees.*

The fact that a witness is an employee of one of the parties is a proper matter to be considered by the jury in passing upon his credibility.

Case at Bar.

The extracts from the charge which were assigned as error were not subject to the objections made thereto. The evidence warranted the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by S. E. Bagley and others against the Central of Georgia Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

See 48 S. E. 179.

The plaintiffs brought suit against the defendant for damages alleged to have arisen from the killing of two mules and

*As to the credibility of railroad employees as witness for their companies, see foot-note appended to Seaboard Air Line Ry. v. Walthour (Ga.), 8 R. R. R. 18, 31 Am. & Eng. R. Cas., N. S., 18; Chicago City Ry. Co. v. Tuohy (Ill.), 4 R. R. R. 1, 27 Am. & Eng. R. Cas., N. S., 1.

a horse by one of the defendant's trains, the petition alleging that the animals were "the property of petitioners." The allegations of negligence set out were as follows: "Petitioners show that the negligence in running said train consisted of the facts that the engine pulling said train was not properly sounded, and the engineer did not keep a proper lookout ahead of the engine, and did not blow the whistle and ring the bell, and did not try to stop the train when petitioners' mules were discovered on the track in front of the train, but ran the train in a very fast and reckless manner, thereby injuring and damaging petitioners as aforesaid." The defendant demurred on the ground that the petition did not allege whether the plaintiffs owned the animals jointly or as partners, or whether each owned one or more of the animals, and that the allegations of negligence were insufficient, in that it was not alleged that after the mules came on the track the engineer had any time to do any of the acts the failure to do which is alleged to be negligence, or that he had any time to do these acts after the mules were discovered on the track. The demurrer was overruled, and the defendant excepted pendente lite. The trial resulted in a verdict for the plaintiffs, and the defendant's motion for a new trial was overruled. It complains of the judgments overruling the demurrer and the motion for a new trial.

Wm. D. Kiddoo, for plaintiff in error.

Shipp & Sheppard, for defendants in error.

COBB, J. 1. It is well settled that allegations that the plaintiff "is owner of" the property involved, or that it "belongs" to him, or he is "seised," and the like, are allegations of an ultimate fact, and not of a mere conclusion of law. See 21 Enc. P. & P. 718, and citations. The demurrer seems to concede this, and avers that an allegation that the animals were "the property of petitioners" does not sufficiently show the character of ownership. The necessary inference to be drawn from this averment is joint ownership in each of the animals referred to in the petition. It is certainly not to be inferred that one of the plaintiffs owned one animal, and the other two.

2. The allegations of negligence in the petition were sufficient. The plaintiffs relied on certain omissions of duty which they claimed constituted negligence. These omissions were subject to explanation by the defendant. It could show that, relatively to the plaintiffs' property, the omissions did not constitute negligence, because the animals could not have been seen earlier, and that after they were seen the engineer did not have time to stop the train before striking the animals. These were, however, matters of defense, and need not have been alleged in the petition.

3. It is complained in the motion for a new trial that the court refused to allow the engineer to answer the following

question: "Now, then, was it possible for you to do anything else besides what you did to prevent the injury?" The court allowed the witness to testify that after seeing the animals he did everything in his power to stop the train. In two other grounds of the motion, complaint is made of the court's refusal to allow similar questions to be answered by the engineer. We think the court went quite far enough in allowing the witness to testify that he did everything in his power to stop the train. The evidence sought was a conclusion of the witness, resting largely upon his mere opinion. This kind of evidence is usually inadmissible. In a case like the present it is better for the engineer to state what he did, and leave to the jury the determination of the question whether, in doing the things detailed, he did everything to prevent the injury which he ought to have done. The engineer not only could but did actually state what he did. See *Mayor of Milledgeville v. Wood*, 114 Ga. 370, 40 S. E. 239 (2); *So. Mut. Ins. Co. v. Hudson*, 115 Ga. 639, 42 S. E. 60 (2).

4. It is also complained that the court, after charging the jury that the fact that witnesses were employees of the defendant was no reason for disbelieving their testimony, added, "except in determining what weight and credit you will give to the testimony of the witnesses." The court stated the rule with absolute correctness. The fact that a witness is an employee of a party to a case is a matter bearing upon the interest of the witness, which the jury may consider in passing upon his credibility, and it was not error to instruct the jury to this effect.

5. Error was assigned upon the following charge: "Now, I charge you, gentlemen, that when stock has been shown to have been killed by the locomotive, cars, or other machinery, that the law presumes negligence on the part of the railroad; that that makes out a prima facie case for the plaintiff; that is, nothing else appearing, the plaintiff would be entitled to recover. I charge you that the defendant may come in and overcome that presumption. That, like all presumption, is a matter that can be overcome by proof. I charge you that presumption may be overcome by showing that the defendant used all ordinary diligence and care to prevent the accident; to prevent the killing." The objection to this charge was that it should have been qualified "so as to apply only to the peculiar facts of negligence alleged in the petition." The argument upon this assignment of error was that, as the plaintiffs could not recover except upon the negligence alleged, the court should have qualified the charge by saying that the presumption simply went to this extent. It is now settled that the presumption arising upon proof of the injury establishes only the negligence alleged, and, if it is shown by uncontradicted evidence that there was no negligence as alleged, the presumption is overcome, and the plaintiff is not entitled to recover, although the proof may

Kendrick v. Seaboard Air Line Ry

show other acts of negligence. *Central of Georgia Ry. Co. v. Weathers*, 120 Ga. 475, 47 S. E. 956. The portion of the charge complained of is absolutely correct in every particular. It simply says that, upon proof of the injury alleged, there is a presumption of negligence, and that, nothing else appearing, the plaintiff would be entitled to recover, but that this presumption may be overcome by proof showing that the defendant exercised all ordinary and reasonable care and diligence. These are simply the general principles of law applicable to such a case, and giving them without qualification was not of itself error. As to the propositions of law contained in the charge, they require no qualification to make them sound, and the assignment of error is subject to the criticism that complaint is made of a correct instruction because some other sound proposition was not given in the same connection. See *Atlantic Coast Line Rd. Co. v. Williams*, 120 Ga. 1042, 48 S. E. 404 (1).

It was further complained that the judge erred in stating the contentions of the parties, this assignment of error being an effort to raise the same question as was sought to be raised by that which has just been considered. The judge, in a general way, stated the contentions of both parties; and, if a more elaborate statement of the contentions had been desired, an appropriate written request should have been made in due time.

The charge was not as full as it might have been, but it contained the general principles of law applicable to the case, and, if amplification had been desired, appropriate requests should have been made. See, in this connection, *Smith v. Mfg. Co.*, 112 Ga. 680, 37 S. E. 861 (2).

The evidence was conflicting, but there was evidence from which the jury could find that the presumption against the company had not been rebutted, and the discretion of the trial judge in refusing to grant a new trial will not be interfered with.

Judgment affirmed. All the Justices concur.

KENDRICK v. SEABOARD AIR LINE RY.

(Supreme Court of Georgia, Jan. 28, 1905.)

[49 S. E. Rep. 762.]

Duty to Trespasser on Track—Presumption of Negligence—Nonsuit—Error.*

A railroad company owes to a trespasser walking upon its tracks the

*As to the care due trespassers on tracks, see foot-note appended to *Rawitzer v. St. Paul City Ry. Co.* (Minn.), 13 R. R. 91, 36 Am. & Eng. R. Cas., N. S., 91; *Hortensine v. Virginia, Carolina Ry. Co.* (Va.), 12 R. R. 616, 35 Am. & Eng. R. Cas., N. S., 616; *Gregory v. Louisville & N. R. Co.* (Ky.), 12 R. R. 293, 35 Am. & Eng. R. Cas., N. S., 293; *Cincinnati, etc., R. R. v. Gregg* (Ky.), 11 R. R. 388, 34 Am. & Eng. R. Cas., N. S., 388; *Chesapeake & O. Ry. Co. v. See's Adm'r* (Ky.), 11 R. R. 342, 34 Am. & Eng. R. Cas., N. S., 342.

Kendrick v. Seaboard Air Line Ry

duty not to hurt him willfully or negligently after his presence becomes known to its servants in charge of one of its trains.

(a) In view of the presumption of negligence raised by law against the defendant company, the evidence introduced in behalf of the plaintiff was such as, if not overcome by evidence showing due diligence on the part of the company, would authorize a recovery by the plaintiff, and accordingly it was error to grant a nonsuit.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by Mamie Kendrick against the Seaboard Air Line Railway. Judgment for defendant. Plaintiff brings error. Reversed.

Williams & Harper, for plaintiff in error.

E. A. Hawkins, for defendant in error.

EVANS, J. Hozie Kendrick was killed by the running of the cars of the defendant railway company, and his widow sued for the value of his life. On the trial the plaintiff offered evidence tending to show that the homicide occurred under the following circumstances: The deceased lived near the city of Americus, and was going from his home to Americus, walking upon the railroad track. When he had reached a point within the yards of the railway company near the coal chute, he was standing near the rail of the main line, watching a freight train, which was moving in his direction with considerable noise. While thus engaged he was struck by an engine running backwards on the main line, and knocked about 10 feet in advance of the engine, and then run over by it. The switchman testified he was riding on the footboard of the engine which killed the plaintiff's husband; that the engine was running backwards at a speed of 7 or 8 miles per hour, and that within about 75 yards of the place of the catastrophe he observed something on the track, and when the engine approached to 40 yards of the place he recognized the object to be a man. He immediately gave a signal to stop, but, as he was standing on the footboard of the tender on the fireman's side, the signal was not seen by the engineer. The deceased was looking at the freight train, which was coming from the east on a parallel track. When the engine was about three feet from the deceased, he turned his head, and apparently observed his danger, and attempted to get off the track. Just at this time the freight train, which was going in an opposite direction with the engine, was passing the place where the deceased was standing. As soon as the deceased was struck by the engine, the switchman gave a signal of distress, which was answered by the engineer with a blast of the whistle, and the engine was stopped. The engine was equipped with steam brake, but no brake was applied until after the engine struck deceased. By applying the brakes the engine could have been stopped in about 10 yards at the rate of speed it was running. The homicide occurred about half past 6 o'clock in the month of

Kendrick v. Seaboard Air Line Ry

December. At the time and prior to striking plaintiff's husband the bell on the engine was ringing. Another witness testified that he had frequently used the railroad track through the yard in walking to and from Americus, and had seen other people "going backwards and forwards there sometime." Upon the conclusion of the plaintiff's evidence she was nonsuited, and the bill of exceptions complains of the grant of the nonsuit.

The plaintiff's husband was walking down the track of the railway company at the time he was killed by the running of the cars. The proof that one pedestrian may have frequently, and others occasionally, used the railroad track in the company's yards as a footpath, is insufficient to establish an implied license to pedestrians to use the track. See *Grady v. Railroad Co.*, 112 Ga. 668, 37 S. E. 861. The plaintiff's husband at the time of his death was therefore a trespasser. The general rule is that "as to a trespasser walking upon the track of a railroad the duty of observing ordinary care and diligence for his protection does not devolve upon the company's servants in charge of a train until his presence upon the track becomes known to them." *Hambricht v. Railroad Co.*, 112 Ga. 36, 37 S. E. 99. When the plaintiff proved that the switchman knew her husband was upon the track, then the burden was on the railway company to show that the death could not have been averted by the exercise of proper care. The company owed the deceased no duty except not to hurt him willfully or negligently after his presence became known to its servants in the operation of the locomotive. *Grady v. Railroad Co.*, *supra*. But when the company was charged with knowledge of the presence of a trespasser on its track it immediately owed the trespasser the duty of exercising ordinary care and diligence to prevent any injury to him. The signal of the switchman was not heeded. The conclusion of the switchman was that the signal could not have been observed by the engineer because of his location on the footboard of the tender. Let this be granted. The record does not disclose whether or not there was a fireman on the engine. If there was a fireman, and he had been on his box, he probably would have observed the signal; and, if he did observe it, his duty would have been to have acted with reference thereto. Assuming there was a fireman, the evidence is silent as to his position, or his knowledge of the signal. He may have been engaged in other duties which would have prevented him from seeing the signal, but this did not appear from the evidence. If there was no fireman, then it would become a question as to whether the switchman exercised due care in placing himself on the footboard of the engine so that his signals could not be seen by the engineer. The plaintiff's evidence establishing a duty on the part of the railroad's servants to exercise ordinary diligence in avoiding any injury to

Manning v. Illinois Cent. R. Co

the person of the plaintiff's husband, and the factum of the injury by the operation of the engine, was sufficient to raise the presumption of negligence against the company. Civ. Code 1895, § 2321. Of course, the defendant might show that due care was exercised so as to rebut the presumption, but until that was done the plaintiff's right to recover existed. The court should have submitted the case to the jury for them to determine whether the defendant's servants exercised ordinary care after the presence of the deceased on the track became known to its servants, or whether, under all the circumstances of the case, the killing of the plaintiff's husband was wanton or willful.

Judgment reversed. All the Justices concur.

MANNING v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky, Jan. 26, 1905.)

[84 S. W. Rep. 565.]

Railroads—Trespasser on Track—Care Required of Train Operatives.*

There can be no recovery for injuries to one run into by a train while walking on the track in the absence of evidence that the operatives of the train saw the trespasser and failed to use ordinary care thereafter.

Appeal from Circuit Court, Graves County.

"Not to be officially reported."

Action by J. J. Manning against the Illinois Central Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. J. Webb and S. H. Crossland, for appellant.

Robbins & Thomas, J. M. Dickinson, and Pirtle & Trabue, for appellee.

HOBSON, C. J. Appellant, on May 1, 1902, lived north of the station Boaz on appellee's road, and was walking along the railroad, going south to his work, which was beyond the station. As he went along, a train passed him, also going south, which pulled in on the side track at the station, and when he reached the side track he walked down the main track. He heard a second train coming southward down the railroad, and, supposing that it would come in on the main track, crossed over to the side track, and, without looking back, proceeded to walk on down the side track in the direction of the first train, which had stopped on the side track some distance south of him. While he was thus walking along the side track, the second train, when it reached the switch, also took the side track, pulling in behind the first, to leave

*See foot-notes appended to *Rawitzer v. St. Paul City Ry. Co.* (Minn.), 13 R. R. R. 91, 36 Am. & Eng. R. Cas., N. S., 91.

the main track clear for a passenger train, and in so doing ran upon him, and knocked him off the track, while he had his back to it, and was under the impression that this train was on the main track. He sued to recover for his injuries, and at the conclusion of all the evidence the court instructed the jury peremptorily to find for the defendant.

Appellant complains of the action of the court, and relies on the case of *Wilmuth's Adm'r v. I. C. R. R. Co.*, 76 S. W. 193, 25 Ky. Law Rep. 671. That case is rested on the idea that the engineer saw the man on the track 200 feet away from him, and, after perceiving his danger, failed to exercise ordinary care for his safety; or at least that there was evidence from which the jury might properly so find. There was no evidence in this case that the engineer saw the appellant before he was struck, or that his presence on the track was perceived by any one on the train in time to avert the danger to him by ordinary care. The plaintiff's evidence failed to show that his presence on the side track was seen by those in charge of the train, and under the well-settled rule that he was a trespasser the company was under no obligation to maintain a lookout for him, and is not responsible to him, unless his danger was perceived, and there was after this a failure to use ordinary care for his safety. The court should have sustained the defendant's motion for a peremptory instruction, made at the conclusion of the plaintiff's evidence. The testimony for the defendant in no way strengthened the plaintiff's case. The proof by the engineer was that by reason of the curve he could not see the plaintiff, as the engine obstructed his view. The fireman testified that he was putting in coal, and when he looked out and saw the plaintiff he at once called to the engineer, who did all he could then to stop the train. Under all the evidence we are satisfied from the proof that the flagman of the first train had turned the switch, and that the second train ran in on the side track very close behind plaintiff, and struck him very soon after he walked from the main track to the side track. But whether this is true or not, and if it be conceded that he was struck after he had been on the side track some distance, and far enough for the engineer to have seen him after rounding the curve, still the fact remains under the evidence that he did not see him, and the peremptory instruction was properly given. The bell on the train was ringing, but it is plain that the plaintiff supposed that the train was on the main track, and therefore did not look back.

Judgment affirmed.

SMITH *v.* CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Wisconsin, Jan. 31, 1905.)

[102 N. W. Rep. 336.]

Personal Injuries—Notice of Claim—Service of Notice—Construction of Statute.*

Rev. St. 1898, § 4222, subd. 5, requiring as a condition precedent to an action for injuries that a notice of the injuries, etc., shall be served on the one claimed to be responsible, in the manner required for service of summons in courts of record, is mandatory, and service on the claim agent of a railroad company is insufficient.

Same—Same—Waiver of Other Notice—Estoppel.

Rev. St. 1898, § 4222, subd. 5, requires as a condition precedent to an action for injuries that a notice of the injuries, etc., shall be served on the one claimed to be responsible, in the manner required for service of summons in courts of record: *held*, that where a notice was served on the claim agent of a railroad, and he corresponded with the injuries partly about the claim, but did nothing to indicate that no other notice would be required, and it did not appear that the injured party was misled, the railroad was not estopped to deny a waiver of any other notice.

Appeal from Circuit Court, Rock County; B. F. Dunwidie, Judge.

Action by Herbert U. Smith against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

This action was commenced against defendant, a railroad corporation, to recover for personal injuries alleged to have been sustained by plaintiff. The complaint alleges that the injuries were sustained on the 7th day of February, 1899, while plaintiff was a passenger on defendant's road; that shortly after the injury considerable correspondence was had between the plaintiff's attorney and defendant's claim agent, Hinsey, concerning the injury, and that notice of the injury was given to Hinsey; that after full investigation of the claim, and on June 2, 1899, Hinsey denied liability, and refused to pay; that the action was not commenced until more than four years after injury; that Hinsey had the management of all claims against defendant and authority to settle or compromise the same, but it does not appear that he had any authority to waive notice of injury, nor does it appear that notice of the injury was given to defendant in the manner provided for the service of summons in courts of record. Defendant demurred to the complaint for the reason, among others, that no notice of injury was given. From the order overruling demurrer this appeal is taken.

H. H. Field and Thos. S. Nolan, for appellants.
Wm. Smith and H. L. Maxfield, for respondent.

*For the authorities in this series on the subject of notice of claims against railroad companies, see foot-note appended to Chicago, B. & Q. R. Co. *v.* Hammond (Ill.), 12 R. R. R. 561, 35 Am. & Eng. R. Cas., N. S., 561.

Smith v. Chicago, M. & St. P. Ry. Co

KERWIN, J. (after stating the facts). The only questions presented are: First, whether notice of injury served upon Hinsey, claim agent, was sufficient; second, if not, whether notice had been waived.

1. The first question turns on the construction of subdivision 5 of section 4222, Rev. St. 1898, which reads as follows: "No action to recover damages for an injury to the person shall be maintained unless, within one year after the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, shall be served upon the person or corporation by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made and that satisfaction thereof is claimed of such person or corporation. Such notice shall be given in the manner required for the service of summons in courts of record. * * *". This statute is clear and unambiguous, and if its words be given their plain, obvious, and ordinary meaning there can be no room for doubt that the Legislature intended notice should be given in the manner provided for the service of summons in courts of record. "It is beyond question the duty of courts in construing statutes to give effect to the intent of the lawmaking power, and seek for that intent in every legitimate way, but * * * first of all in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation." Sutherland on Statutory Construction, § 237; Newell v. People ex rel. Phelps, 7 N. Y. 9; Ogden v. Glidden, 9 Wis. 46; Battis v. Hamlin, 22 Wis. 669; Mundt v. S. & F. du L. R. Co., 31 Wis. 451; Boland v. Gillett, 44 Wis. 329; Gilbert v. Dutruit, 91 Wis. 661, 65 N. W. 511. If the words of a statute are plain, they must be strictly followed, but, if they are ambiguous, the whole context must be looked to for their explanation. Potter's Dwaris, 126. "When the meaning of a statute is clear, and its provisions are susceptible of but one interpretation, that sense must be accepted as the law. Its consequences, if evil, can only be avoided by a change of the law itself, to be effected by the Legislature, and not by judicial construction." Sutherland on Statutory Construction, § 238. The Legislature in the statute in question here used words of plain and definite import, and to put a construction upon them different from the ordinary meaning of the words used would be holding that the Legislature did not mean what it has expressed. The statute plainly provides that service of notice shall be made in the manner provided for the service of summons in courts of record. These words cannot be construed to mean that the service "may" be made in some other manner without doing violence to the

express language of the statute. It is claimed by respondent that the word "shall" is directory, and may be construed to mean "may," and several cases are cited where the word "shall" used in statutes has been held to mean "may"; but this doctrine does not apply to the case at bar. Sutherland on Statutory Construction, § 460. "Where an existing right or privilege is subjected to regulation by a statute in negative words, or those which import that it is only to be exercised in a prescribed manner, the mode so prescribed is imperative." Sutherland on Statutory Construction, § 459; State, on Complaint of Doerflinger v. Hilmantel, 21 Wis. 566, 574. The statute in question imposes a positive limitation or regulation upon the right to commence actions for personal injuries, and provides that notice shall be served within one year, and served in a specified manner. Such provision is imperative, and not permissive. If, under this statute, any other or different service than that clearly provided for can be made, the plain language of the statute will be defeated. Whether this statute is a wise one, or whether some other service might not be as effectual, is not a question for the courts. Where the statute is plain and unambiguous, and there is no room for doubt as to the intention of the Legislature, it is the duty of the court to enforce it. Newell v. People ex rel. Phelps, 7 N. Y. 9; Gilbert v. Dutruit, 91 Wis. 661, 65 N. W. 511. Mr. Justice Marshall, in Gilbert v. Dutruit, *supra*, quoting Vattel, says: "It is not allowable to interpret what has no need of interpretation. When the meaning is evident, and leads to no absurd conclusions, there can be no reason for refusing to admit the meaning which the words naturally present. To go elsewhere in search of conjecture in order to restrict or extend the act would be but an attempt to elude it. Such a method, if once admitted, would be exceedingly dangerous, for there would be no law, however definite and precise in its language, which might not, by interpretation, be rendered useless." It is quite obvious that the Legislature intended to provide a plain and certain manner for the service of notice in personal injury cases, and, the statute being positive and explicit, its provisions cannot be dispensed with, or any other manner of service substituted. Sowle v. Tomah, 81 Wis. 349, 51 N. W. 571; Curry v. City of Buffalo, 135 N. Y. 366, 32 N. E. 80; Atkinson v. Chicago & N. W. R. Co., 93 Wis. 362, 67 N. W. 703; Borst v. Sharon (Sup.) 48 N. Y. Supp. 996.

2. It is claimed, however, by respondent, that the correspondence between attorney of plaintiff and defendant's claim agent amounted to a waiver of any other or further notice. It does not appear from the record that Hinsey waived the notice provided by statute, nor that he had any authority to do so. The alleged waiver is pleaded as an estoppel, but all the elements of estoppel appear to be wanting. Nothing was said or done by Hinsey indicating that no further notice

Shade's Adm'r v. Covington-Cincinnati E. R., T. & B. Co

would be required, nor does it appear that plaintiff was misled by the acts of defendant, or induced to believe that no other notice would be required. We are therefore unable to discover anything from the record which would justify the court in holding that there was a waiver of the notice required. *Borst v. Sharon* (Sup.) 48 N. Y. Supp. 996; *First National Bank of Elkhorn v. Wood*, 26 Wis. 500. It follows from what has been said that the statute in question is mandatory, and requires the service of notice in the manner provided for service of summons in courts of record, and that such service had not been waived. The complaint, therefore, fails to state a cause of action, and the order overruling the demurrer should be reversed.

The judgment of the court below is reversed, and the cause is remanded for further proceedings according to law.

SHADE'S ADM'R v. COVINGTON-CINCINNATI ELEVATED R. & TRANSFER & BRIDGE CO.

(Court of Appeals of Kentucky, Feb. 1, 1905.)

[84 S. W. Rep. 733.]

Evidence—Statements to Physician—Cause of Injury—Res Gestæ.*

The statement by one injured, some time after the injury, to her physician, that the injury was caused by a fall on ice on defendant's toll-bridge, was not admissible as *res gestæ* in an action for the injury.

Appeal from Circuit Court, Kenton County.

"To be officially reported."

Action by Eliza Shade's administrator against the Covington-Cincinnati Elevated Railroad & Transfer & Bridge Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Myers & Howard, for appellant.

Galvin & Galvin, for appellee.

O'REAR, J. Eliza Shade was discovered on 18th of February, 1902, on or near the northern end of appellee's bridge, injured; her leg, or one bone of it, being broken. Possibly she was otherwise hurt. She was sent in a carriage to her home, in Covington, and died in a few weeks. Whether she died of the injuries received on the bridge was not proven. In this suit by her administrator against appellee, the owner of the toll bridge, to recover damages for her injury and death, the plaintiff declared upon the negligence of appellee in suffering its bridge to be and remain in unfit condition by the accumulation of ice and snow upon the passenger foot-

*For the authorities in this series on the question whether statements of injured persons are *res gestæ*, see foot-note appended to *Williams v. Southern Ry.* (S. Car.), 12 R. R. R. 604, 35 Am. & Eng. R. Cas., N. S., 604.

way. At the close of the evidence the court peremptorily directed a verdict for the defendant.

It is doubtful whether there was any evidence that the bridge was in an unfit condition for travel by pedestrians at the place and at the time where Mrs. Shade fell, if she fell on the bridge. That there was considerable ice and snow elsewhere and at other times on the bridge does not satisfy plaintiff's allegation or sustain his action. But assuming that there was at least a scintilla of evidence that the bridge was in dangerous condition throughout from the accumulation of ice and snow negligently allowed by appellee during the whole of the day Mrs. Shade was injured, there is still a hiatus in plaintiff's case. There was no proof that she fell because of the ice and snow, or that she was herself in the exercise of due care, or that her injuries were caused by the condition of the bridge. The witness Waring does not at all identify Mrs. Shade as one of the persons whom he says he helped up from falls about that time. Indeed, his evidence rather shows that she was not. Plaintiff's case rested, if it can be maintained at all, upon the declaration made by Mrs. Shade to her physician, some time after she had been taken to her home, that she had fallen on the ice on the C. & O. Bridge (the name by which appellee's bridge is popularly called). It is contended by appellant that her declarations made to her physician in explanation of the cause of her injury, and made to him to enable him to treat it, are of the *res gestæ*, and receivable in evidence as such. "Where the bodily and mental feelings of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are considered competent and original evidence in his favor. There are ills and pains of the body, which are proper subjects of proof in a court of justice, which can be shown in no other way. Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations, and expressions as usually and naturally accompany and furnish evidence of a present, existing pain or malady." *Bacon v. Charlton*, 7 Cush. 586. Here the party whose statement is offered to be proved was suffering from a physical injury. What she said to her physician as to the pain it then caused her, and the effect it had upon her senses, was necessary for him to know in order that he might intelligently treat the injury. Under such circumstances, it is presumed that the party suffering will state truly how she is affected, as otherwise the medical man might be at a loss as to the remedies needful to her condition. The incentive for a fair statement is so great that the presumption is she will not hazard an untruth to better her financial condition, as by fabricating a basis of claim against the person charged with her injury at the expense of her permanent

Chicago, etc., R. Co. v. Sevocek

health, or may be of her life. For that reason the law allows the proof of what she said to her physician at the time of his examination, as part of the *res gestæ*. What the injured party may have said to any one at the time of the injury, or so immediately after it as to be regarded part of it, as being the verbal part of a continuing occurrence, would also be admitted, upon familiar grounds. What was said after the lapse of some minutes—a half hour or so in this case—to the attending physician, to aid him in determining the nature of the injury and to prescribe a remedy or treatment, is allowed, as an extension of the same rule of evidence. It rests logically upon the necessity of the case. It is matter proper to be shown, and not susceptible generally of being otherwise proven. But it must stop with the necessity for it. It was necessary for the physician to know whether the patient was suffering, and where the pain was, and as to its character. It was also proper that he should know how the injury was inflicted, as upon that knowledge his treatment, in part, might depend. So it was competent to show that the patient said she had received a blow on her head, if she did say it, and how she was otherwise hurt. But it was wholly immaterial to the physician's understanding what it was necessary for him to know in treating the injuries whether she fell on appellee's bridge or elsewhere, or that she fell on ice.

The opinion in *Omberg v. U. S. Mutual Accident Ass'n*, 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413, is relied on by appellant. In that case the patient, who was suffering from an inflamed toe, the result of septic poisoning, told his physician that it was caused by a mosquito bite at the affected spot. The evidence was held to be competent on the ground that the statement was necessary, or at least proper, to enable the physician to understand the illness, and was part of the description of the wound, and inseparable from the patient's complaint with respect thereto. But the court was careful to restrict the application of the rule to statements made by the patient to the physician in the treatment of the malady, and added, "A narrative of the events attending the mishaps would not be competent." Nor was a narrative of the events attending the mishap competent in this case.

The judgment must be affirmed.

CHICAGO, B. & O. R. CO. v. SEVCEK.

(Supreme Court of Nebraska, Dec. 7, 1904.)

[101 N. W. Rep. 981.]

Station Grounds—Duty to Fence.

Where a railroad company outside of the limits of a city, town, or village has established a flag station with platform, elevator, office, and scales, coalhouse, corn cribs, etc., for public use, it is not bound, under

[Chicago, etc., *R. Co. v. Sevcek*

the provisions of the statute requiring railroads to be fenced, to fence its road in such a manner as to prevent the public from having proper access to its station grounds.

Same—Same.

The failure to fence is excusable, however, only to an extent sufficient to afford the public and the railroad company necessary facilities for transacting the business reasonably to be expected at this locality.

Same—Same—Killing Stock—Liability Fixed by Place of Entry.*

It is the locality where animals pass onto the right of way that determines the liability of the company, as between a place where the statute requires it to fence its road and a locality which it is not required to fence.

Killing Stock—Failure to Fence—Liability.

Under the facts in this case, *held* that the railroad company was not excused from fencing its road at the point where the animals went upon the right of way, and that it was liable for the killing of the same. (Syllabus by the Court.)

Commissioners' Opinion. Error to District Court, Howard County; Gutterson, Judge.

Action by Albert Sevcek against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. W. Deweese and Frank E. Bishop, for plaintiff in error.
T. T. Bell, for defendant in error.

LETTON, C. The sole question presented in this case is whether or not the railroad company is liable for the killing of six hogs belonging to defendant in error, which were killed at a point within the station grounds at the station of Warsaw, in Howard county. Warsaw is a flag station on the line of the railroad. There is no town or village at the station, but there is a platform, side track, elevator, office, and scales, stockyards, coalhouse, and corn cribs. The railroad track runs nearly straight east and west, a side track being on the south side of the main track, about 900 feet long. At this point, for a distance of about 1,200 feet, the right of way is 200 feet wide, on the north side of the track being 50 feet and on the south side 150 feet from the center line of the track. The elevator, stockyards, corn crib, and coalhouse are all situated upon the south side of the track, while the platform is upon the north side. There is also upon these grounds a house which is occupied part of the year by a man who attends to buying and shipping grain at the elevator. A public highway runs across the right of way between the stockyards and the elevator almost at right angles to the track. The evidence shows that Warsaw is a time card station, which has the time for the arrival and departure of trains set down; that no ticket office or waiting room is

*See monograph appended to *Macon & B. R. Co. v. Revis* (Ga.), 12 R. R. 787, 35 Am. & Eng. R. Cas., N. S., 787; *Sappington v. Chicago & A. Ry. Co.* (Mo.), 3 R. R. 862, 26 Am. & Eng. R. Cas., N. S., 862; note, 8 Am. & Eng. R. Cas., N. S., 684; *Eaton v. McNeill* (Ore.), 8 Am. & Eng. R. Cas., N. S., 680; *Patrie v. Oregon Short Line R. Co.* (Idaho), 14 Am. & Eng. R. Cas., N. S., 39.

Chicago, etc., R. Co. v. Sevcek

there, and no tickets are sold at the station, but that tickets are sold from other points to that place. There are usually from 40 to 50 car loads of freight per year, and grain, live stock, emigrant movables, and machinery, baggage, and trunks, and people are loaded and unloaded at the platform, stock is shipped and received at the stockyards, and coal received and sold at the coalhouse.

Section 10,020, c. 47, Cobbe's Ann. St. 1903, requires all railroads to erect and maintain fences on the sides of their railroad sufficient to prevent cattle, horses, sheep, and hogs from getting on the railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, and requires them at all road crossings to maintain cattle guards sufficient to prevent cattle, horses, sheep, and hogs from getting onto such railroad, and makes the railroad corporation liable for damages to stock killed or injured where the fences and guards are not in sufficiently good repair to accomplish the object for which the same are prescribed. If this statute is to be construed literally, the only exception to the requirement of fencing is in public highways and within the limits of towns, cities, and villages; and, since Warsaw is neither a town, city, nor village, the defendant in error has no defense. Must the statute be strictly and literally construed? This statute has heretofore come before this court for construction with reference to the duty of the railroad company to fence near its switch tracks. In C., B. & Q. Ry. Co. v. Hogan, 27 Neb. 801, 43 N. W. 1148, where it was stipulated that the corporate limits of a city, with buildings thereon, extended along one side of the various side tracks of a railway, the land on the other side not being platted, that the side tracks were necessary for the business of the company, and that it would be inconvenient and unsafe to the employees of the company if the cattle guard and fence were erected, it was held that the railway company was not required to fence its tracks at that point. Upon a rehearing the former conclusion was reaffirmed, and the action was reversed and dismissed. 30 Neb. 686, 46 N. W. 1015. In Union Pacific Ry. Co. v. Knowlton, 43 Neb. 751, 62 N. W. 203, an animal was killed at a point about midway between the limits of the city of Lincoln and the village of West Lincoln. On the part of the railroad company it was contended that the point was within the actual limits of the Lincoln yard, that the track was in constant use in the making up of trains, and that a fence thereon would be dangerous to employees. The court says: "It is conclusively shown that the defendant's depot grounds are situated more than a mile distant from the point of collision. Nor is there in the record any evidence tending to prove that the use of the track between Lincoln and West Lincoln was necessary in the making up of trains, or that the facilities afforded by the tracks within the yard limits were insufficient for that pur-

pose. The most that can be claimed by the defendant is that it is convenient for it to use the track in question in making up its trains, and that it was occasionally used for that purpose. The Legislature could not have intended the provision of the exception above noted to include tracks outside of the limits of cities, towns, and villages remote as is this one from the depot grounds and side tracks, and not necessary for use in making up trains." In Minnesota a similar statute made no exceptions as to fencing within cities or villages, and the court held that there was no reason why the requirements of the act should not apply within cities and villages as well as in the country, and that other provisions of the law with reference to obstructing streets and highways would prevent the inclosure of the railroad track at such points. The court further said, however: "There is another exception implied as to places required to be left open by the public necessity or convenience, such as grounds about stations, which are used for the entrance or exit of passengers or the receipt and delivery of freight; but this public convenience is the limit of the exception." *Greeley v. St. Paul, M. & M. Ry. Co.*, 33 Minn. 136, 22 N. W. 179, 53 Am. Rep. 46. The statute is an exercise of the police power of the state enacted for the welfare not of the railroad, but of the people. The object of statutes of this nature is primarily the benefit of the public, and secondarily for the benefit of private individuals. In its construction, therefore, courts must give that construction which is most for the public benefit, and must consider in a secondary degree what is the interest of the individual. To enforce the statute according to the letter would effectually deprive the public of all the convenience and advantage obtained by the location of a railroad station, grain and coal market, and stockyard at that point, and would prohibit every railroad corporation from maintaining transportation facilities for the convenience of farming communities away from the limits of towns, cities, or villages. It is not the benefit to the railroad that is to be considered so much as the welfare and convenience of the public. Every railroad company in this state is required by statute to furnish sufficient accommodations for the transportation of passengers and freight, and to take, transport, and discharge all passengers to and from such stations as the trains stop at, from or to all places and stations upon their road, on the due payment of fare or freight bill. Under this section the railroad company is compelled to transport passengers to Warsaw upon the due payment of fare, and to furnish them proper facilities for access to or egress from their station platform. It is unreasonable to suppose that the law compels a railroad company to furnish facilities to the public, and at the same time it be compelled by another law to fence the public out from such facilities. This would be manifestly a forced construction of the law. The

legislature certainly never intended to prevent a railroad company from furnishing such facilities to rural communities in which no town or village exists, where the demand justifies the giving of the same. As between the right of the public to thus be accommodated and the danger of the loss to the owner of live stock by the straying of his animals upon the track, the benefit to the public is of more importance, and there is an implied exception to the strict letter of the statute, which is dictated by sound reason.

We agree, therefore, with the contention of the plaintiff in error that a railroad company is not bound to fence its tracks in such a manner as to exclude the public from proper access to its station grounds. The failure to fence is excusable, however, only to an extent sufficient to afford the public and the railroad company necessary facilities for transacting the business reasonably to be expected at this locality. While the railroad company would be excused from fencing a sufficient portion of its right of way to allow the public access to the loading and unloading facilities there provided, it would not be excused for a failure to fence another or greater space. At the locality in question, however, we see no reason why the railroad company should not have fenced its right of way on the north side to connect with the fence on the west side of the highway, as well as to have fenced it to the highway fence on the east side of the road, as it actually did. It is the locality where animals pass onto the right of way that determines the liability of the company as between a place where the statute requires it to fence its road and a locality which it is not required to fence.

It appears from the plat that both sides of the highway running north from the right of way are fenced, and that the tract of land from whence the hogs went upon the right of way was not open to the public highway. To fence the right of way at this point would in no manner interfere with the access of the public to the transportation facilities afforded by the station. It was private property over which the hogs came, on which the public would be trespassers. Under the circumstances presented by this case the principle invoked by the plaintiff in error does not apply. We cannot speculate upon the proposition as to whether, even if the fence had been along the north side of the right of way, the hogs would have gotten onto the track by traveling east to the line of the highway. The plat in evidence shows a fence along the highway, but whether it is hog-tight or not does not appear. There is no evidence to show that they came upon the right of way at the highway, and there is evidence to show that they came upon the right of way at a point where the track might have been fenced without inconvenience to the public or the employees of plaintiff in error. We believe it was the duty of the railroad company under the statute to

Pennsylvania Co. v. Newby

have a fence at this point, and that they are therefore liable for the actual value of the hogs killed.

We recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

PENNSYLVANIA CO. *v.* NEWBY.

(Supreme Court of Indiana, Jan. 11, 1905.)

[72 N. E. Rep. 1043.]

Cattleguards—Care Required.*

Burns' Ann. St. 1901, § 5323, requiring railroad companies to erect cattle guards, is a police regulation, and requires such companies, in so far as they can do so consistently with their obligation to protect life and freight on their trains, to provide cattle guards sufficient to prevent stock from getting on their railroad.

Same—Same—Usage of Other Companies.

A usage, by first-class railroads, as to the form of cattle guards in use, does not fix the standard of care required of a railroad, by Burns' Ann. St. 1901, § 5323, in constructing cattle guards.

Appeal from Circuit Court, Morgan County; J. C. Robinson, Judge pro tem.

Action by William Newby against the Pennsylvania Company. From a judgment in favor of plaintiff, defendant appeals. Case transferred from Appellate Court, as authorized by Burns' Ann. St. 1901, § 1337u. Affirmed.

S. O. Pickens and R. F. Davidson, for appellant.

O. Matthews, for appellee.

GILLETT, J. Action under section 5323, Burns' Ann. St. 1901, to recover the value of two mules belonging to appellee, and killed on appellant's right of way. The question before us is presented by an assignment of error which draws in question the propriety of the action of the lower court in overruling a motion, made by appellant, for judgment on answers to interrogatories notwithstanding the general verdict. The contention of appellant's counsel is summarized in their brief as follows: "A special finding that cattle guards at a crossing were of the style in general use by first-class railroads shows a sufficient compliance with the statute requiring railroads to be securely fenced." The question as to the sufficiency of a cattle guard over which an animal has passed in getting on the right of way is ordinarily to be submitted to the jury, under appropriate instructions

*For authorities in this series on the subject of the duties and liabilities of railroad companies with respect to cattle guards, in actions for injuries to live stock. See foot-note appended to *Campbell v. Iowa Cent. Ry. Co.* (Iowa), 12 R. R. R. 601, 35 Am. & Eng. R. Cas., N. S., 601.

Birmingham Ry. Light & Power Co. v. Brantley

from the court. The statute is a police regulation, and at points where cattle guards should be placed it is the duty of a railroad company, in so far as it can do so consistently with its higher obligation to protect life and freight upon its trains, to provide "cattle guards suitable and sufficient to prevent cattle, horses, sheep, hogs, and other stock from getting on such railroad." It may be the law in negligence cases—at least as applied to cases involving the sufficiency of complicated pieces of mechanism, concerning which the jury is presumably without experience—that it is competent to introduce evidence concerning the general usage of others in a like situation, on the theory, as has been stated, that the fact that a usage or custom is general or universal tends to show its reasonableness. But at the furthest this would only be a matter of evidence. We need not advert to the settled rules concerning the answers to interrogatories which are sought to be used to overthrow the general verdict further than to state that as evidence might have been introduced under the issues which showed, notwithstanding such usage, that the cattle guard in question was insufficient in fact, we are bound to presume that evidence tending to show that fact was offered, and that the jury gave credence to such evidence. Whatever may be the rule as to the competency of evidence tending to show that the style of cattle guards used by appellant was in general use by first-class railroads, it is not the law that the usage of such railroads fixes the standard of care. *Louisville, etc., R. Co. v. Wright*, 115 Ind. 378, 16 N. E. 145, 17 N. E. 584, 7 Am. St. Rep. 432; *Lake Erie, etc., R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564; *Allen v. Burlington, etc., R. Co.*, 64 Iowa, 94, 19 N. W. 870; *Wright v. Boller*, 42 Hun, 77; *Malloy v. Township of Walker*, 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695; *Gulf, etc., R. Co. v. Evansich*, 61 Tex. 3; *Lawson, Usages and Customs*, § 172; *Black, Law & Prac. in Accident Cases*, § 193.

Judgment affirmed.

JORDAN, J., did not participate.

BIRMINGHAM RY. LIGHT & POWER CO. v. BRANTLEY.

(Supreme Court of Alabama, Nov. 21, 1904.)

[37 So. Rep. 698.]

Assignments of Error—Waiver.

The failure to insist on assignments of error is a waiver thereof.

Collision between Street Railway Car and Another Vehicle—Failure to Maintain Lookout and Contributory Negligence—Proximate Cause.*

Where the servants of a street railroad might have avoided a collision with a wagon, but for their negligent failure to keep a lookout,

*As to the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-note appended to *Annis*.

Birmingham Ry. Light & Power Co. v. Brantley

any negligence on the part of a person in the wagon in causing it to be in the way of the car was not the proximate cause of an injury to the occupant of the wagon resulting from the collision.

Same—Contributory Negligence—Instruction Not Warranted by Evidence.

In an action against a street railroad for injuries in a collision with plaintiff's wagon, where there was evidence which would have authorized the jury to find that plaintiff's injuries were directly attributable to the subsequent negligence of the defendant's servants in charge of the car in failing to keep a lookout, and that but for such negligence the injuries would not have been inflicted, a charge on contributory negligence was properly refused, as calculated to mislead the jury.

Appeal from Circuit Court, Jefferson County; Osceola Kyle, Judge.

Action by Fannie Brantley against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff for \$2,000, defendant appeals. Affirmed.

The complaint contained four counts. The first and fourth counts charged simple negligence. The second count charged that the injuries complained of were inflicted upon the plaintiff "by the wanton, willful, or intentional negligence of the defendant in the running and operation of its said car at the time and place of the occurrence of said injuries." The third count charged that "the defendant wantonly, willfully, or intentionally ran its car or cars against said wagon wheel, and threw the said wagon over with the plaintiff," inflicting the injuries complained of. For answer to the complaint the defendant pleaded the general issue, and by special plea set up the contributory negligence of the defendant. The facts of the case are sufficiently stated in the opinion.

The court, at the request of the plaintiff, gave to the jury the following written charges:

"(1) The court charges the jury all that is meant by wanton or willful or intentional negligence is the conscious failure on the part of the motorman to use reasonable care to avoid the injury after discovering the danger to the wagon, if the jury believe from the evidence that there was such failure and the injury resulted therefrom; and in such case any negligence on the part of the plaintiff, whether it contributed to the injury or not, is not a defense or excuse to the defendant for injuring the plaintiff.

"(2) Although the plaintiff may have been guilty of negligence in allowing the wheel of the wagon to be on the track or near the track, yet this negligence will not defeat the

ton Elec. & Gas Co. v. Hewitt (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas., N. S., 312.

Mutual rights and obligations of street railways and other users of streets, see foot-notes appended to Louisville Ry. Co. v. Colston (Ky.), 12 R. R. R. 668, 35 Am. & Eng. R. Cas., N. S., 668.

As to what is, and is not, the proximate cause of an injury, see foot-note appended to Haley v. St. Louis Transit Co. (Mo.), 12 R. R. R. 142, 35 Am. & Eng. R. Cas., N. S., 142, where all preceding authorities in this series are collected.

plaintiff's right to recover, if the motorman actually saw, or by keeping a constant and vigilant lookout could have seen, the exposed condition of danger of the wagon or of the plaintiff in time to have avoided the injury by the exercise of reasonable care, and negligently failed to exercise such reasonable care; and if the jury are reasonably satisfied from the evidence that such negligent failure of the motorman was the proximate cause of the injury to the plaintiff, then the defendant is liable, and the verdict of the jury should be for the plaintiff.

"(3) It was the duty of the motorman to keep a constant and vigilant lookout for persons and things on the track; and if the jury are reasonably satisfied from the evidence that the motorman, by keeping such constant and vigilant lookout, could have seen the exposed condition of danger of the wagon on or near the track, or of the plaintiff, in time to have avoided injuring the plaintiff by the exercise of reasonable care, then the law charges the motorman with seeing the exposed condition of the wagon or of the plaintiff within the time stated above in this charge, whether he saw them or not.

"(4) Although the plaintiff may have been guilty of negligence in exposing herself to injury by allowing the wagon wheel or any part of the wagon to remain on or near the track, yet such negligence will not defeat her right to recover, if the motorman saw the exposed condition of danger of the wagon or of the plaintiff in time to have avoided the injury by the exercise of reasonable care and by the use of all means at his command, and negligently failed to exercise such reasonable care; and if the jury are reasonably satisfied from the evidence that such negligent failure of the motorman was the proximate cause of the injury to the plaintiff, then the defendant is liable, and the verdict should be for the plaintiff.

"(5) If the jury should be reasonably satisfied from the evidence the plaintiff was guilty of negligence in allowing the wagon wheel or wagon to be on or so near to the track as to expose it to danger by the running of the car, yet such negligence would not be considered as contributory negligence to the injury, if the jury believe from the evidence to their reasonable satisfaction that the motorman saw the exposed condition of the wagon to danger on or near the track in time to avoid the injury by reducing the rate of speed in time so as to so control it and avoid the injury, or stop the car, if necessary, to prevent the injury, and the motorman negligently failed to give such warning and reduce the speed or stop said car, and failed to use all means at his command to avoid the injury, this negligence of the motorman was the proximate cause of the injury to the plaintiff."

The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's

Birmingham Ry. Light & Power Co. v. Brantley

refusal to give each of the following charges requested by it:

"(1) I charge you that the undisputed evidence in this case, if you believe it, shows that the plaintiff was guilty of contributory negligence.

"(2) In this case, if the jury believe from the evidence that the plaintiff was guilty of contributory negligence as set up in one of defendant's pleas, they must find for defendant, even though they should further believe from the evidence that defendant or its motorman was guilty of willfulness or wantonness as charged in one or more of the counts.

"(3) If you believe the evidence, you must render your verdict in favor of the defendant.

"(4) If you believe the evidence, you cannot find for the plaintiff under the first count of the complaint.

"(5) If you believe the evidence, you cannot find for the plaintiff under the second count of the complaint.

"(6) If you believe the evidence, you cannot find for the plaintiff under the third count of the complaint.

"(7) If you believe the evidence, you cannot find for the plaintiff under the fourth count of the complaint."

Walker, Tillman, Campbell & Walker, for appellant.

M. M. Ullman and W. H. Denson, for appellee.

SHARPE, J. This action is on account of personal injuries sustained by plaintiff in being knocked from a wagon by a car operated by defendant on a street of the city of Birmingham. The complaint consists of four counts, to all of which was pleaded the general issue and a plea setting up contributory negligence on the part of the plaintiff. Issues were joined and the case tried on these pleas. Assignments of error are predicated solely of rulings on demurrers to the complaint and of the giving and refusal of charges. The assignments relating to demurrers and those based on the refusal of charges numbered, respectively, 5 and 6 have not been insisted on, and are therefore considered as waived.

There was evidence tending to show that at the time of the accident plaintiff was selling milk from a wagon to which was hitched a horse she had driven across the railroad track, and had stopped so that the wagon stood in the path of the car; that before crossing she looked for the car and saw none; that there was on the wagon a cover which was between her and the car, and that she did not know of the car's approach until it struck the wagon. There was also evidence tending to show that defendant's servants in charge of the car were aware of the danger to plaintiff in time to have stopped the car before it reached the wagon. This last phase of the evidence was, however, opposed by the testimony of defendant's motorman and conductor, to effect that the wagon was backed in the way of the car when it was too late to prevent the collision, and that until it was backed the wagon was several feet away from the track.

Birmingham Ry. Light & Power Co. v. Brantley

While running the car along the public street defendant's servants were under the duty of keeping a diligent lookout for persons using the street, including the space occupied by the railroad track, and if the collision would not have occurred but for a negligent failure of defendant's servants to keep such lookout, or to stop the car after discovery by them of the danger to plaintiff, then such a negligence as plaintiff may have been guilty of in causing or allowing the wagon to be in the way of the car would not be deemed a proximate cause of the injury, and she would not be thereby precluded from recovering for such negligence on the part of those servants. *S. & N. Ala. R. Co. v. Sullivan*, 59 Ala. 272; *Memphis & C. R. Co. v. Womack*, 84 Ala. 149, 4 South. 618; *Memphis & C. R. Co. v. Martin*, 131 Ala. 269, 30 South. 827; *Central of Georgia R. Co. v. Lamb*, 124 Ala. 172, 26 South. 969; *Central of Georgia R. Co. v. Foshee*, 125 Ala. 199, 27 South. 1006. Therefore, though there was no issue of whether the injury was committed wantonly, willfully, or intentionally, the court could not have properly assumed that the plea of proximate contributory negligence was proved, or that there was no right of recovery, or that there was none under the first, or under the fourth, count of the complaint; and it follows that charges 1, 3, 4, and 7 requested by defendant were properly refused.

Charge 2 predicated a finding by the jury for defendant upon a brief of the facts alleged in defendant's plea of contributory negligence. As the evidence would have authorized the jury, if believed by them, to find that plaintiff's injuries were directly attributable to the subsequent negligence of defendant's servants, and not to hers as alleged in the plea, and that but for such subsequent negligence the injuries sustained by her would not have been inflicted, the charge was calculated to mislead the jury, and was therefore properly refused. In other words, although the jury may have believed that she was negligent in stopping her vehicle on or in dangerous proximity to defendant's track, or that she negligently drove, or backed, or allowed it to be backed, onto or in dangerous proximity to the track of defendant, yet, if this negligence on her part was not the proximate cause of her injuries, but the subsequent negligence of defendant's servants was the direct cause, her negligent conduct was but a condition which would not defeat her right of recovery.

The charges given at the plaintiff's request are in harmony with the law as declared in the authorities above referred to. The judgment will be affirmed.

BURNS v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, Dec. 31, 1904.)

[59 Atl. Rep. 687.]

Railroads—Accident at Crossing—Evidence.

In an action against a railroad company to recover for injuries at a crossing, where the railroad was a dividing line between a city and a township, an invalid ordinance of the city requiring the railroad company to erect a safety gate on the township side of the crossing is inadmissible in evidence even to show the dangerous character of the crossing.

Appeal from Court of Common Pleas, Cambria County.

Action by Catherine Burns against the Pennsylvania Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

Defendant presented, inter alia, the following points:

“(4) That the city of Johnstown did not have authority to require safety gates to be erected and operated on each side of the road, inasmuch as the southerly side thereof was in Lower Yoder township, and the court is requested to strike out the testimony relating thereto. Answer. The only effect this testimony could have is that of showing the dangerous character of the crossing. That the city of Johnstown attempted to make the defendant company erect safety gates there, we say, could only go to indicate to you the dangerous character of the crossing. You have no right to hold the railroad company responsible for not erecting safety gates because they would have been one means of warning persons about to go over the crossing of the dangerous character of the crossing. The city could not have compelled the railroad company to have erected safety gates in Lower Yoder township, because that territory is not within the jurisdiction of the city of Johnstown. This ordinance can only go to show the dangerous character of the crossing, and we submit this testimony to you for that purpose only.”

“(7) That, under all the evidence, the verdict should be for the defendant. Answer. We refuse that point. As we view the case, the question is purely a question for the jury, and, if we were to take the case from the jury, we feel that we would be guilty of error. There are times when it becomes the duty of the court to say that the plaintiff has failed to introduce such evidence as would fasten responsibility upon the defendant, and when it would be proper to direct a verdict for the defendant, or to direct a compulsory nonsuit, because of the insufficiency of the testimony introduced, which would amount to the same as if no evidence at all were introduced. Therefore we refuse this point.

“(8) That positive proof that the whistle was sounded at the usual place and that the bell was being rung is of higher

Burns v. Pennsylvania R. Co

value than negative testimony of witnesses who did not hear it, and it should prevail. The Court. In this connection, we say to you that if you find from the evidence that the whistle was blown and the bell rung at such place and in such manner that the decedent must have heard it and been warned, then, of course, it does not matter how many people did not hear it; but if the whistle was blown, as testified to by the witnesses, at a place where it is usual to blow the whistle, and the bell was rung, if the warning did not reach that crossing, and could not be heard by persons going over it—was not of such character as the law contemplates—. If the warning was not calculated to warn and did not warn persons passing over, it was unavailing. That question is entirely for you. If you find that the whistle was sounded after the train crossed the Morrellville crossing, and yet persons going over the Brownstown crossing could have heard and must have heard it, it was not necessary to have the whistle blown again. The fact we want to impress you with is whether the whistle, which evidently was sounded after leaving 'SX' tower that morning, must have reached the ears of persons going over the Brownstown crossing, for, if the persons going over there took their chances, there could be no recovery. On the other hand, it was the duty of the persons conducting the train to give such warning as would be effective, and, if they did not give such warning, the defendant company would be responsible for their negligent acts."

Verdict and judgment for plaintiff for \$12,000.

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, POTTER, and THOMPSON, JJ.

H. W. Storey, for appellant.

E. T. McNeelis and William Williams, for appellee.

THOMPSON, J. Appellee's husband was killed while crossing appellant's railroad at what is known as the "Brownstown Crossing," in the suburbs of Johnstown, and for his loss the appellee brought this suit. The deceased, who lived a short distance from that crossing, left his home on January 9, 1903, at 6:30 in the morning, to go to the Cambria Steelworks where he was employed. The morning was dark, and there was a slight fall of snow. He reached the crossing, and while passing over it was struck by a moving train of appellant and instantly killed. The southerly line of appellant's railroad is the dividing line between Lower Yoder township and the city of Johnstown, and the road ending with McConaghy street is about 66 feet within the limits of the latter place. The crossing was one open to the view of the men in charge of trains, and to people approaching it. There was conflicting testimony as to the speed of the train which caused the accident. Some of the witnesses made it from 40 to 45 miles per hour, and some made it less. It certainly, however, was not less than 30 miles per hour.

Burns v. Pennsylvania R. Co

Appellant's negligence, it was contended, consisted in approaching this alleged dangerous crossing at a high rate of speed without giving signals within a proper distance. The dangerous character of the crossing, the high rate of speed, and the absence of the proper signals were the elements which constituted appellant's alleged negligence.

As part of the proofs tending to establish the dangerous character of the crossing, appellee offered in evidence an ordinance of the councils of the city of Johnstown requiring the appellant to erect and maintain safety gates at the crossing in question. This ordinance provides that the appellant company is required "to erect, maintain and operate safety gates at the intersection of the Pennsylvania Railroad with the public road known as the Brownsville Road in the Sixteenth Ward. Said safety gates shall be maintained and operated on each side of the railway and shall be closed at the approach of all trains or locomotives to said intersection and opened as soon as the same shall have passed." The learned trial judge, in answer to the appellant's fourth point, said: "The only effect this testimony [referring to the ordinance] could have is that of showing the dangerous character of the crossing. That the city of Johnstown attempted to make the defendant company erect safety gates there, we say, could only go to indicate to you the dangerous character of the crossing. You have no right to hold the railroad company responsible for not erecting safety gates because they would have been one means of warning persons about to go over the crossing of the dangerous character of the crossing. The city could not have compelled the railroad company to have erected safety gates in Lower Yoder township, because that territory is not within the jurisdiction of the city of Johnstown. This ordinance can only go to show the dangerous character of the crossing and we submit this testimony to you for that purpose only." The ordinance was admittedly invalid and beyond the power of councils to pass it. At most, it amounts to nothing more than expressions of individual opinions of the members of councils that they thought the crossing dangerous. If each member had, upon the floor of councils, declared such to be his opinion, and a minute had been made to that effect, clearly such minute would not be competent evidence to establish the dangerous character of the crossing. The question was one of fact for the jury, and that fact was not to be determined by opinions of members of councils expressed there. The ordinance was invalid, without authority, and ineffective, and imposed no duty or obligation upon appellant. So void and inoperative by reason of the want of power to make the same, by no process of reasoning can it be said to be competent proof tending to prove the dangerous character of the crossing. This was not a case where the alleged negligent act done is in violation of a valid existing ordinance relating to the act,

Burns v. Pennsylvania R. Co

and where it alone is not evidence of negligence, but where it, with the other circumstances, is for the jury in determining the question of negligence. In the case of *Ubelmann v. American Ice Company*, 209 Pa. 398, 58 Atl. 849, where an ordinance in regard to elevators had been offered in evidence, Mr. Justice Brown, in discussing ordinances as evidence, says: "Ordinances and their violation are admissible, not as substantive and sufficient proof of the negligence of the defendant, but as evidence of municipal expression of opinion on a matter as to which the municipal authorities had acted, that the defendant was negligent, and are to be taken into consideration with all the other facts in the case." And after discussing the various cases upon the subject, he says: "The only effect of the introduction of these ordinances was to confuse and mislead the jury. Though there was no violation of them, so far as they related to the specific act of negligence charged, zealous counsel may have led the jury to believe that there was, and to the indiscriminating mind such a conclusion was more than possible. Even if there had been a violation of other sections of the ordinance of 1900 than the clause quoted, such violation would have had no relevancy to the issue the jury were trying." Thus ordinances may be competent for a limited purpose, and then only in connection with other evidence. As they involve duties in regard to the municipality, or obligations relating to them, it is aptly said in the opinion *supra* they are not admissible as substantive or sufficient proof, but as evidence of municipal expression of opinion. Within authoritative action, they may be evidence of such opinion, but beyond that they cannot be. A void ordinance is no ordinance, and is not an expression of any opinion. It is a *tabula rasa*, and has no significance.

The learned trial judge erred in admitting the alleged ordinance in evidence, and in his answer to appellant's fourth point, and the judgment must therefore be reversed and a new trial awarded. But it may be proper to add that the duty to stop, look, and listen is an unbending rule, and, when a person is killed at a crossing, the presumption arises that he has done his duty in that regard; that proof intended to be confirmatory of the performance of a duty by stopping, looking, and listening does not, when so intended, necessarily rebut the presumption; that the rate of speed at which a train may pass a crossing must, in view of its environments and locality, be shown to be dangerous, and, under the circumstances, such as would constitute negligence arising from a failure of duty imposed by law; that a jury is not authorized to determine the speed of an approaching train, and, having done so, then arbitrarily fix such speed as the standard that would be dangerous; that there is no failure of duty if proper signals be given of a train approaching a crossing at

Union Stock Yards Co. v. Chicago, etc., R. Co

a rate of speed that, in view of its locality and surroundings, may be warranted, and proofs of such signals to negative negligence are not to be disregarded by a jury upon an arbitrary determination of the speed as dangerous.

The judgment is reversed, and a venire de novo is awarded.

UNION STOCK YARDS COMPANY OF OMAHA v. CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY.

(Argued December 14, 15, 1904. Decided January 9, 1905.)

[25 Sup. Ct. Rep. 226.]

Negligence—Contribution among Wrongdoers.

A terminal company whose negligence toward one of its employees in failing, by a proper inspection, to discover a defective brake on a car deliver to it by a railroad company has been established by a competent tribunal, cannot enforce contribution or recover indemnity from the railroad company because of the latter's like neglect of duty.

On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit, presenting a question as to the liability of a railroad company which has delivered a car in bad order to a terminal company, to indemnify the latter for damages which it has been compelled to pay to one of its employees because of its negligence in failing properly to inspect the car. Answered in the negative.

Statement by MR. JUSTICE DAY:

This case comes here on the certificate of the United States circuit court of appeals for the eighth circuit. The facts embodied therein are: The circuit court of the United States, sitting at Omaha, Neb., sustained a demurrer to the petition of the plaintiff in error against the defendant in error. The facts stated in the petition, in substance, are as follows:

"The plaintiff, the stock yards company, is a corporation which owns stock yards at South Omaha, Nebraska, railroad tracks appurtenant thereto, and motive power to operate cars for the purpose of switching them to their ultimate destinations in its yards from a transfer track which connects its tracks with the railways of the defendant, the Burlington company. The Burlington company, is a railroad corporation engaged in the business of a common carrier of freight and passengers. The defendant places the cars destined for points in the plaintiff's yards on the transfer track adjacent to the premises of the plaintiff, and the latter hauls them to their points of destination in its yards for a fixed compensation, which is paid to it by the defendant. The plaintiff receives no part of the charge to the shipper for the transportation of the cars, but the defendant contracts with the shipper to deliver the cars to their places of ultimate destina-

Union Stock Yards Co. v. Chicago, etc., R. Co

tion in the plaintiff's yards, and receives from the shipper the compensation therefor. The defendant delivered to the plaintiff upon the transfer track a refrigerator car of the Hammond Packing Company, used by the defendant to transport the meats of that company, to be delivered to that company by the plaintiff in its stock yards. This car was in bad order, in that the nut above the wheel upon the brake staff was not fastened to the staff, although it covered the top of the staff, and rested on the wheel as though it was fastened thereto, and this defect was discoverable upon reasonable inspection. The plaintiff undertook to deliver the car to the Hammond company, and sent Edward Goodwin, one of its servants, upon it for that purpose, who, by reason of this defect, was thrown from the car and injured while he was in the discharge of his duty. He sued the plaintiff, and recovered a judgment in one of the district courts of Nebraska for the damages which he sustained by his fall, on the ground that it was caused by the negligence of the stock yards company in the discharge of its duty of inspection to its employee. This judgment was subsequently affirmed by the supreme court of Nebraska (*Union Stock-Yards Co. v. Goodwin*, 57 Neb. 138, 77 N. W. 357), and was paid by the plaintiff."

Upon this certificate the circuit court of appeals propounds the following question:

"Is a railroad company which delivers a car in bad order to a terminal company, that is under contract to deliver it to its ultimate destination on its premises for a fixed compensation, to be paid to it by the railroad company, liable to the terminal company for the damages which the latter has been compelled to pay to one of its employees on account of injuries he sustained while in the customary discharge of his duty of operating the car, by reason of the defect in it, in a case in which the defect is discoverable upon reasonable inspection?"

Mr. Frank T. Ransom for stock yards company.

Mr. Charles J. Greene for railroad company.

MR. JUSTICE DAY delivered the opinion of the court:

We take it that this inquiry must be read in the light of the statement accompanying it. While instruction is asked broadly as to the liability of the railroad company to the terminal company, for damages which the latter has been compelled to pay to one of its own employees on account of injuries sustained, it is doubtless meant to limit the inquiry to cases wherein such recovery was had because of the established negligence of the terminal company in the performance of the specific duty stated, and which it owed to the employee. For it must be taken as settled that the terminal company was guilty of negligence after it received the car in question, in failing to perform the duty of inspection required of it as

to its own employee. The case referred to in the certificate (Union Stock-Yards Co. v. Goodwin, 57 Neb. 138, 77 N. W. 357) is a final adjudication between the terminal company and the employee, and it therein appears that the liability of the company was based upon the defective character of the brake, which defect a reasonably careful inspection by a competent inspector would have revealed, and it was held that in permitting the employee to use the car without discovering the defect the company was rendered liable to him for the damages sustained. We have, therefore, a case in which the question of the plaintiff's negligence has been established by a competent tribunal, and the inquiry here is, may the terminal company recover contribution, or, more strictly speaking, indemnity, from the railroad company because of the damages which it has been compelled to pay under the circumstances stated?

Nor is the question to be complicated by a decision of the liability of the railroad company to the employee of the terminal company, had the latter seen fit to bring the action against the railroad company alone, or against both companies jointly. There seems to be a diversity of holding upon the subject of the railroad company's liability under such circumstances, in courts of high authority.

In *Moon v. Northern P. R. Co.*, 46 Minn. 106, 24 Am. St. Rep. 194, 48 N. W. 679, and *Pennsylvania R. Co. v. Snyder*, 55 Ohio St. 342, 60 Am. St. Rep. 700, 45 N. E. 559, it was held that a railroad company was liable to an employee of the receiving company who had been injured on the defective car while in the employ of the latter company when, under a traffic arrangement between the companies, the delivering company had undertaken to inspect the cars upon delivery, and, as in the *Moon Case*, where there was a joint inspection by the inspectors of both companies. This upon the theory that the negligence of the delivering company, when it was bound to inspect before delivery, was the primary cause of the injury, notwithstanding the receiving company was also guilty of an omission to inspect the car before permitting an employee to use the same.

A different view was taken in the case of *Glynn v. Central R. Co.*, 17 Am. & Eng. R. Cas., N. S., 482, 175 Mass. 510, 78 Am. St. Rep. 507, 56 N. E. 698, in which the opinion was delivered by Mr. Justice Holmes, then chief justice of Massachusetts, in which it was held that, as the car, after coming into the hands of the receiving company, and before it had reached the place of the accident, had crossed a point at which it should have been inspected, the liability of the delivering company for the defect in the car, which ought to have been discovered upon inspection by the receiving company, was at an end. A like view was taken by the supreme court of Kansas in the case of *Missouri, K. & T. R. Co. v. Merrill*, 65 Kan. 436, 59 L. R. A. 711, 93 Am. St. Rep. 287,

Union Stock Yards Co. v. Chicago, etc., R. Co

70 Pac. 358, reversing its former decision in the same case reported in 61 Kan. 671, 60 Pac. 819. But we do not deem the determination of this question necessary to a decision of the present case.

Coming to the very question to be determined here, the general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done. In many instances, however, cases have been taken out of this general rule, and it has been held inoperative in order that the ultimate loss may be visited upon the principal wrongdoer, who is made to respond for all the damages, where one less culpable, although legally liable to third persons, may escape the payment of damages assessed against him by putting the ultimate loss upon the one principally responsible for the injury done. These cases have, perhaps, their principal illustration in that class wherein municipalities have been held responsible for injuries to persons lawfully using the streets in a city, because of defects in the streets or sidewalks caused by the negligence or active fault of a property owner. In such cases, where the municipality has been called upon to respond because of its legal duty to keep public highways open and free from nuisances, a recovery over has been permitted for indemnity against the property owner, the principal wrongdoer, whose negligence was the real cause of the injury.

Of this class of cases is *Washington Gas-light Co. v. District of Columbia*, 161 U. S. 316, 40 L. Ed. 712, 16 Sup. Ct. Rep. 564, in which a resident of the city of Washington had been injured by an open gas box, placed and maintained on the sidewalk by the gas company, for its benefit. The District was sued for damages, and, after notice to the gas company to appear and defend, damages were awarded against the District, and it was held that there might be a recovery by the District against the gas company for the amount of damages which the former had been compelled to pay. Many of the cases were reviewed in the opinion of the court, and the general principle was recognized that, notwithstanding the negligence of one, for which he has been held to respond, he may recover against the principal delinquent where the offense did not involve moral turpitude, in which case there could be no recovery, but was merely *malum prohibitum*, and the law would inquire into the real delinquency of the parties, and place the ultimate liability upon him whose fault had been the primary cause of the injury. The same principle has been recognized in the court of appeals of the state of New York in *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 30 Am. St. Rep. 685, 31 N. E. 897, the second proposition of the syllabus of the case being:

"Where, therefore, a person has been compelled, by the

judgment of a court having jurisdiction, to pay damages caused by the negligence of another, which ought to have been paid by the wrongdoer, he may recover of the latter the amount so paid, unless he was a party to the wrong which caused the damage."

In a case cited and much relied upon at the bar (*Gray v. Boston Gaslight Co.*, 114 Mass. 149, 19 Am. Rep. 324), a telegraph wire was fastened to the plaintiff's chimney without his consent, and, the weight of the wire having pulled the chimney over into the street, to the injury of a passing traveler, an action was brought against the property owner for damages, and notice was duly given to the gas company, which refused to defend. Having settled the damages at a figure which the court thought reasonable, the property owner brought suit against the gas company, and it was held liable. In the opinion the court said:

"When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable or *participes criminis*, and the damage results from their joint offense. This rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such case the parties are not in *pari delicto* as to each other, though, as to third persons, either may be held liable."

In a later case in Massachusetts (*Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 51 L. R. A. 781, 86 Am. St. Rep. 478, 59 N. E. 657), it was held that a manufacturer of an iron boiler known as a vulcanizer, which had been furnished upon an order which required a boiler which would stand a pressure of 100 pounds to the square inch, which order was accordingly accepted, the manufacturer undertaking to make the boiler in a good and workmanlike manner, but which, because of a defect, in that the hinge of the door was constructed in such a way that it did not press tight enough against the face of the boiler to stand a pressure of 75 pounds, at which pressure the packing blew out and allowed the naphtha vapor to escape, was liable for the damages which the hose company had been compelled to pay to one of its employees, injured by the accident, although the defect might have been discovered upon reasonable inspection by the hose company. In that case the boiler was sold upon a warranty. As was said by Mr. Chief Justice Holmes, delivering the opinion of the court:

"The very purpose of the warranty was that the boiler should be used in the plaintiff's works with reliance upon the defendant's judgment in a matter as to which the defendants were experts and the plaintiff presumably was not. Whether

the false warranty be called a tort or a breach of contract, the consequences which ensued must be taken to have been contemplated and were not too remote. The fact that the reliance was not justified as toward the men does not do away with the fact that the defendants invited it, with notice of what might be the consequences if it should be displaced, and there is no policy of the law opposed to their being held to make their representations good."

Other cases might be cited which are applications of the exception engrafted upon the general rule of noncontribution among wrongdoers, holding that the law will inquire into the facts of a case of the character shown, with a view to fastening the ultimate liability upon the one whose wrong has been primarily responsible for the injury sustained. In the present case there is nothing in the facts as stated to show that any negligence or misconduct of the railroad company caused the defect in the car which resulted in the injury to the brakeman. That company received the car from its owner, the Hammond Packing Company, whether in good order or not the record does not disclose. It is true that a railroad company owes a duty of inspection to its employees as to cars received from other companies as well as to those which it may own. *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 73, 39 L. Ed. 624, 15 Sup. Ct. Rep. 491. But in the present case the omission of duty for which the railroad company was sought to be held was the failure to inspect the car with such reasonable diligence as would have discovered the defect in it. It may be conceded that, the railroad company having a contract with the terminal company to receive and transport the cars furnished, it was bound to use reasonable diligence to see that the cars were turned over in good order, and a discharge of this duty required an inspection of the cars by the railroad company upon delivery to the terminal company. But that the terminal company owed a similar duty to its employees, and neglected to perform the same, to the injury of an employee has been established by the decision of the supreme court of Nebraska, already referred to.

The case then stands in this wise: The railroad company and the terminal company have been guilty of a like neglect of duty in failing to properly inspect the car before putting it in use by those who might be injured thereby. We do not perceive that, because the duty of inspection was first required from the railroad company, that the case is thereby brought within the class which hold the one primarily responsible, as the real cause of the injury, liable to another less culpable, who may have been held to respond for damages for the injury inflicted. It is not like the case of the one who creates a nuisance in the public streets; or who furnishes a defective dock; or the case of the gas company, where it created the condition of unsafety by its own wrongful act; or the case of the defective boiler, which blew out

Nat. Bank of Bristol v. B. & O. R. Co

because it would not stand the pressure warranted by the manufacturer. In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted. The principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other.

In the present case the negligence of the parties has been of the same character. Both the railroad company and the terminal company failed, by proper inspection, to discover the defective brake. The terminal company, because of its fault, has been held liable to one sustaining an injury thereby. We do not think the case comes within that exceptional class which permits one wrongdoer who has been mulcted in damages to recover indemnity or contribution from another.

For the reasons stated, the question propounded will be answered in the negative.

NATIONAL BANK OF BRISTOL v. BALTIMORE & O. R. CO.

(Court of Appeals of Maryland, Nov. 18, 1904.)

[59 Atl. Rep. 134.]

Bills of Lading—Lex Locī.

A bill of lading issued in Virginia is governed as to its legal qualities by the law of Virginia.

Common Law—Presumption.

In the absence of evidence to the contrary, it will be presumed that the common law prevails in Virginia.

Bills of Lading—Negotiability.*

At common law a bill of lading is not, in an unrestricted sense, a negotiable instrument, but quasi negotiable only, and this limited negotiability may be destroyed by stamping or printing across the face of the instrument the words "Not negotiable."

Same—Same—Transfer.*

A bill of lading, though made nonnegotiable by its terms, may, like any other nonnegotiable instrument or chose in action, be transferred by assignment, the assignee taking subject to the equities between the original parties.

*See *Ryan v. Great Northern Ry. Co.* (Minn.), 8 R. R. R. 315, 31 Am. & Eng. R. Cas., N. S., 315 (as between the carrier of goods and the owner to whom the same are consigned, the bill of lading is a reliable symbol of title, and vests in the legitimate holder thereof the right to possession of the property); *Cameron v. Orleans & J. Ry. Co., Limited* (La.), 3 R. R. R. 829, 26 Am. & Eng. R. Cas., N. S., 829 (pledge, effect of subsequent delivery of bill of lading where property had been seized at suit of pledge's creditor); *First Nat. Bank of Pullman v. Northern Pac. Ry. Co.* (Wash.), 3 R. R. R. 4, 26 Am. & Eng. R. Cas., N. S., 4 (rights of transferee under Washington statute declaring bills of lading to be negotiable instruments); note, 16 Am. & Eng. R. Cas., N. S., 255 (effect of transfer of bill of lading on right of stoppage of transitu); note, 10 Am. & Eng. R. Cas., N. S., 402 (negotiability); note, 10 Am. & Eng. R. Cas., N. S., 397 (transfer by indorsement and

Nat. Bank of Bristol v. B. & O. R. Co

Same—Right of Assignee.

An assignee of a nonnegotiable bill of lading takes title to the goods represented by the bill, subject only to the equities of those whose names appear upon, or are in some way connected with, the bill, and is not affected by equities existing in favor of strangers whose interest in no way appears upon it.

Same—Same.

Where there is a collateral fact which is known to an assignee of a chose in action, and which is sufficient to put him on inquiry, knowledge of such collateral fact will be held equivalent to knowledge of the ultimate fact, where inquiry would disclose the same.

Same—Title Passing to Vendee.

Evidence that a vendor had sold lumber to his vendee, had loaded it on a car for him, had shipped it to him, and had accepted from him a check for the price, dated one day after the sale, authorizes a finding that there had been a sale on credit and a delivery to the common carrier, under which title had passed to the vendee.

Same—Rights of Vendee.

Where there has been a sale and delivery to the vendee, he is authorized to procure a bill of lading in his own name as shipper and owner, and a subsequent failure to pay the price does not divest his title or that of his assignees of the bill of lading.

Same—Transfer of Title—Stoppage in Transitu.*

The indorsement and delivery of a bill of lading transfers the title to the property to the vendee, is a complete delivery of the goods, and divests the vendor's lien, subject only to his right of stoppage in transitu in the event of the vendee's insolvency before payment for the goods, and if the rights of no third person have intervened.

Same—Innocent Purchaser—Rights.*

One who in good faith takes a bill of lading from a vendee acquires an unassailable title to the goods, notwithstanding fraud of the vendee, even as against the defrauded vendor.

Same—Transfer—Discounting—Rights of Bank.*

Where a vendor put it into the power of his vendee to deal with the property as his own, and thereby enable him to mislead a bank, which in good faith discounted his draft and accepted a bill of lading on the goods sold as collateral security, any loss arising out of the transaction must fall upon the vendor.

delivery); *Alabama Mid. Ry. Co. v. Darby* (Ala.), 13 Am. & Eng. R. Cas., N. S., 105 (consignee's right to recover not on possession of bill of lading); *Chicago, Packing & Provision Co. v. Savannah, F. & W. Ry. Co.* (Ga.), 10 Am. & Eng. R. Cas., N. S., 391 (delivery of goods to endorsee, partnership as endorsee, delivery upon a written order of one of the partners); *Commercial Bank v. Chicago, etc., R. Co.* (Ill.), 4 Am. & Eng. R. Cas., N. S., 263 (delivery of goods to holder of bill of lading); *Union Pacific Ry. Co. v. Johnston* (Neb.), 2 Am. & Eng. R. Cas., N. S., 601 (delivery of goods where consignee did not surrender bill of lading made at the peril of the carrier); *Witt v. East Tennessee & W. N. C. R. Co.* (Tenn.), 8 Am. & Eng. R. Cas., N. S., 380 (delivery without requiring surrender of bill of lading); *Cox v. Vermont Cent. R. Co.* (Mass.), 9 Am. & Eng. R. Cas., N. S., 591 (effect of transfer); *Western & A. R. Co. v. Ohio Valley Bkg. & Trust Co.* (Ga.), 15 Am. & Eng. R. Cas., N. S., 839 (liability of carrier for failure to deliver goods upon demand of holder of bill of lading); *Nebraska Meal Mills v. St. Louis S. W. Ry. Co.* (Ark.), 7 Am. & Eng. R. Cas., N. S., 591 (liability of carrier where delivery of goods without production of bill of lading); *Midland Nat. Bank v. Missouri Pac. Ry. Co.* (Mo.), 2 Am. & Eng. R. Cas., N. S., 586 (liability on original bill where property has been delivered upon duplicate); *Cox v. Vermont Cent. R. Co.* (Mass.), 9 Am. & Eng. R. Cas., N. S., 591; *Raleigh & G. R. Co. v. Lowe* (Ga.), 10 Am.

See () on page 206.

Nat. Bank of Bristol v. B. & O. R. Co

Same—Stoppage in Transitu.†

A vendor who has parted with title to the goods sold and has delivered them to a common carrier for the vendee has no right of stoppage in transitu after the vendee has transferred the title to another by assignment of the bill of lading.

Instructions.

An instruction denying a recovery and making no reference to facts relied on authorizing the same in effect withdraws all such facts from the consideration of the jury, and is erroneous if such facts constitute a ground of action.

Appeal from Superior Court of Baltimore City; Pere L. Wickes, Judge.

Action by the National Bank of Bristol against the Baltimore & Ohio Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, and SCHMUCKER, JJ.

Francis E. Pegram and Edwin T. Dickerson, for appellant.
George P. Bagby, for appellee.

McSHERRY, C. J. This is an appeal from a judgment rendered by the superior court of Baltimore City. An action of trover was instituted in that court by the appellant, the National Bank of Bristol, against the Baltimore & Ohio Railroad Company, to recover the value of a car load of walnut lumber of which the appellant claimed to be the owner, and which it was alleged the appellee had converted to its own use. The declaration, which sets out at large the facts upon which the appellant relies to make out its case, need not be particularly alluded to, inasmuch as no questions arise on the pleadings. The only matters with which we are concerned on this appeal are those presented by the two bills of exception contained in the record. The first bill of exception brings up a ruling of the court on the admissibility of evidence, and the second concerns the action of the trial court on the prayers for instructions to the jury. There is some conflict in the evidence, but that is not of material consequence in dealing with the legal principles which will control this controversy, because the facts must ultimately be found by the jury. It appears that on the 7th day of November, 1902, a certain E. L. De Camp drew at Bristol, Tenn.,

& Eng. R. Cas., N. S., 398 (negotiability); *Baker v. Chicago, etc., Ry. Co. (Iowa)*, 6 Am. & Eng. R. Cas., N. S., 772 (retention of bill of lading, title to goods); *Western & A. R. Co. v. Ohio Valley Bkg. & Trust Co. (Ga.)*, 15 Am. & Eng. R. Cas., N. S., 839 (right of bona fide holder where carrier changes destination of shipment); *Commercial Bank v. Chicago, etc., R. Co. (Ill.)*, 4 Am. & Eng. R. Cas., N. S., 263 (right to deliver goods to holder of bill of lading).

†For authorities in this series on the right of stoppage in transitu, see *Felix v. Brandstetter Co. (Iowa)*, 2 R. R. R. 930, 25 Am. & Eng. R. Cas., N. S., 930; monograph, 16 Am. & Eng. R. Cas., N. S., 258 et seq.; *Brewer Lumber Co. v. Boston & A. R. Co. (Mass.)*, 21 Am. & Eng. R. Cas., N. S., 548 (end of transit).

a draft on Cameron & Co., 29 P. O. avenue, Baltimore, Md., payable to the order of John B. Baumgardner, cashier, for \$400, which was cashed by the Bristol National Bank, and the proceeds were carried on the books of that bank to the credit of the drawer. Attached to the draft was a bill of lading issued by the Norfolk & Western Railway Company at Marion Station, Va., on November 7, 1902, for the transportation of one car load of walnut lumber in car No. 23,914, shipped by E. L. De Camp, "shipper as owner," and consigned "To the order of E. L. De Camp, Locust Point." Upon the face of the bill of lading there was printed in full-faced type the words "Not negotiable." Immediately beneath these words appears the following clause: "If the word 'order' is written immediately below or after the name of the party to whose order the property is consigned, the surrender of the bill of lading properly endorsed shall be required before the delivery of the property at destination, as provided by section 9 of the conditions on the back hereof." When the draft was discounted by the bank in the regular course of business, the bill of lading was indorsed by De Camp, and attached thereto as collateral security, and the draft, with the attached bill of lading, was forwarded for payment, but was returned to the appellant bank in about five days, protested for nonpayment. At the time the draft was discounted for De Camp he represented himself to be the bona fide owner of the bill of lading and the lumber, and it was solely on the faith and security of the bill of lading that the discount was made. Within five days after De Camp had been credited with the proceeds of the draft by the Bristol Bank, he checked out the funds. After Cameron & Co. had refused to accept the bill of lading and pay the draft, and after both had been returned to the bank on November 13th, the bank forwarded the bill of lading to Price & Heald, in Baltimore, with instructions to receive the car load of walnut lumber described in the bill of lading, and to sell the same for account of the appellant bank. Price & Heald, on November 14th, exhibited to the Baltimore & Ohio Railroad Company the bill of lading for the car load of walnut lumber, and demanded that the lumber be turned over to them, but the appellee declined to comply with that demand, and delivered the lumber to the agents of Atkins Bros., who had given the appellee a bond of indemnity to secure the railroad company against loss by reason of the delivery of the lumber to Atkins Bros. The appellee then proved, after the court had overruled an objection to the admissibility of the evidence, that the firm of Atkins Bros., manufacturers of lumber at Attoway, Va., agreed to sell to E. L. De Camp a car load of walnut lumber, they to load the same, and to hold it until a check given to them by De Camp on the appellant bank was paid; the lumber—the same now in controversy—was to continue to remain the property of the vendors until the check was paid;

that there was not a sale, but an agreement to sell, which De Camp fully understood; that De Camp, without the authority, knowledge, or consent of the vendors, shipped the car and procured the bill of lading to be made out in his own name; that he did not assure the vendors that the check he gave them was good; that when the check last alluded to was returned unpaid the vendors went to Baltimore, whither the lumber had been shipped, and, reaching there before the car arrived, gave a bond of indemnity to the railroad company, and secured the lumber, which they sold through an agent; that De Camp gave the vendors a check in payment for the lumber on November 7th, but dated it the day following, and that the vendors deposited it in their bank on November 10th for collection; that Atkins Bros. made no effort to ascertain whether the check would be paid, and that they made no arrangement with the railroad authorities that the car should remain on the siding, where it had been loaded, until they could hear from the check. When the check was presented at the Bristol National Bank, De Camp had no funds to his credit there, having withdrawn them about the 12th of November. On November 18th, after the return of De Camp's check to Atkins Bros., the latter wrote to the appellant bank a letter in which they said: "Messrs. Price & Heald of Baltimore, Maryland, state that you have sent them bill of lading for car of lumber, N. & W. No. 23914 to sell for your account. We would respectfully notify you that this car of lumber belongs to us. We sold it to Mr. E. L. De Camp, in payment of which he gave his check and draft on your bank which you refused to honor claiming that De Camp had no funds." To the admissibility of all of this evidence the plaintiff objected, but the court overruled the objection, and thereupon the first exception was reserved. We need not pause at this time to inquire whether the evidence objected to and above set forth was admissible, because in considering the action of the court upon the prayers contained in the second bill of exception the propriety of the ruling made in the first exception will be necessarily involved. In rebuttal the appellant produced a letter from Atkins Bros., dated November 17th, and addressed to Price & Heald, the agents of the appellant bank, in which the following statement is made: "On November 7th, we shipped from Marion, Va. to Locust Point Station, Baltimore, car of lumber, N. & W. No. 23914. We sold this car to E. L. De Camp, shipped to him in Baltimore. He gave us in settlement his check for part and draft for balance. The bank at Bristol reports no funds, consequently we wished to stop the payment of them by you to E. L. De Camp." Upon the close of the evidence each party presented one prayer. That of the appellant was rejected, whilst that of the appellee was granted. These prayers will be found set forth in the margin.¹

¹ Plaintiff's prayer: "The plaintiff prays the court to instruct the jury that, if they shall find from the evidence that Messrs. Atkins

The theory upon which the court evidently acted in refusing the appellant's and in granting the appellee's prayer was that the title of the bank to the lumber, and its right to maintain this action, depended wholly upon its ownership of the bill of lading, and, as that instrument had stamped upon it the words "Not negotiable," the bank did not stand in the situation of a bona fide indorsee of a negotiable security, who took it for value, before maturity, without notice of any imperfections in its origin; and, as Atkins Bros. had prior equities, the bank could not recover. The bill of lading evidencing the contract between the shipper and the railway company was issued in Virginia, and its qualities are such as the law of that state, and not the law of this state, impressed upon it. There is no proof in the record as to what the law of Virginia is in this respect, and we must consequently presume that as to bills of lading the common law prevails there. By the common law a bill of lading was not, in an unrestricted sense, a negotiable instrument, like a promissory note, but was, as this court has repeatedly stated, quasi negotiable only. *Baltimore & Ohio Railroad Company v. Wilkens*, 44 Md. 11, 22 Am. Rep. 26. But even that restricted common-law negotiability may be limited and still further qualified by the insertion of appropriate terms wholly destroying all negotiability, and it seems to be generally agreed that such a result may be accomplished by simply stamping or printing across the face of the instrument the words "Not negotiable," as was done in this instance. 21 Am. & Eng. Ency. Law (2d Ed.) 545. The nonnegotiability of the bill of lading does not prevent it from being assignable. Like any other non-negotiable instrument or chose in action, it may be transferred by assignment; and when thus dealt with the assignee takes a valid title to it, subject, of course, to the equities existing

Bros. sold and shipped to E. L. De Camp at Baltimore, Md., a car load of walnut lumber, as set out in the bill of lading offered in evidence, and received from said E. L. De Camp his check and draft in settlement, then, notwithstanding said draft and check were not paid, a good title passed from Atkins Bros. to said De Camp, which title passed to the plaintiff upon the indorsement of the bill of lading, and their verdict must be for the plaintiff."

Defendant's prayer: "The defendant prays the court to instruct the jury that, even though they find that Atkins Bros. sold the lumber in controversy to De Camp, and delivered same to the Norfolk & Western Railroad for transportation and delivery to De Camp, or his order, yet if they find that De Camp obtained the title to and possession of said lumber by giving Atkins Bros. in payment thereof a draft which turned out to be worthless, and that when Atkins Bros. learned that said draft was worthless, and before the defendant had delivered said lumber, Atkins Bros. demanded that the defendant turn over said lumber to them, and that accordingly the defendant did turn over said lumber to Atkins Bros., their verdict must be for the defendant, provided the jury further find that the bill of lading filed with the declaration was executed in the statute of Virginia, and that at the time De Camp indorsed the bill of lading to the plaintiff (if the jury find that it was so indorsed) it had the words 'not negotiable' printed on its face."

between the original parties to it, of which, if there are any, he is held to have had notice. *Steele v. Sellman*, 79 Md. 1, 28 Atl. 811. But what are the equities with which the assignee of a nonnegotiable bill of lading in such a case as this is chargeable? Surely not the equities of third parties whose names do not appear upon and are in no way connected with the bill of lading. A bill of lading, as a mere document, is valueless. It is of consequence only in so far as it is the evidence of title to something in somebody. Its transfer is the transfer of the title to the thing described in it, and whatever equities exist between the parties to it with respect to the title of the property which it purports to represent will follow that property into the hands of the assignee of the bill of lading, unless some other legal or equitable principle intervenes to preclude the assertion of a prior right as against a bona fide assignee for value. In the case at bar the name of Atkins Bros. does not appear upon the bill of lading at all. De Camp was the ostensible owner and the actual shipper of the lumber, and he was also the consignee. Nothing was disclosed on the face of the instrument to indicate that any other person than De Camp had any right to or claim upon the lumber, and there was absolutely no word, mark, or sign to put the bank on inquiry as to De Camp's ownership, or to suggest even a suspicion that some one else had a superior right to the property. When there is a collateral fact, which is known to an assignee of a chose in action, and which, if followed, would result in revealing the existence of the ultimate fact sought to be established, then knowledge of such collateral fact will be held equivalent to notice of the ultimate fact, and will bind the party to be affected as conclusively as though actual knowledge of the ultimate fact had been brought home to him. But the bill of lading contains no entry which could possibly have induced the bank to conjecture that De Camp was not the exclusive owner of the lumber. Any inquiry it could have made would have been either from De Camp or from the railroad agent who issued the bill of lading, and there is nothing in the record to intimate that the latter could have stated verbally anything different from that which the bill of lading discloses; whilst De Camp in fact represented himself to be the owner of the lumber. No inquiry, therefore, on the part of the bank, from either of the parties to the bill of lading, would have disclosed anything beyond that which the bill of lading itself exhibited.

But if it were conceded that in spite of there being nothing on the face of the bill of lading to indicate that Atkins Bros. had sold the lumber to De Camp, and that the latter had not paid for it, and that because of these circumstances the bank, though it did not know them, was none the less chargeable with knowledge of them, merely because the words "Not negotiable" were indorsed upon the bill of lad-

Nat. Bank of Bristol v. B. & O. R. Co

ing, still there was evidence before the jury tending to show, if credited by them, such a state of facts as would preclude Atkins Bros. from asserting a title to the lumber as against the appellant bank. There was evidence, as we have stated—particularly that furnished by the letters from which extracts have been quoted—tending to show that Atkins Bros. had sold this lumber to De Camp, had loaded it on a car for him, had shipped it to Baltimore, and had received and accepted from him a check for the purchase price, dated one day after the actual sale. This evidence, if believed by the jury, would enable them to conclude that there had been a sale of the lumber on credit, and a delivery of it to the common carrier, which was a delivery to the vendee, and therefore that the title had passed from Atkins Bros. to De Camp. *Hall v. Richardson*, 16 Md. 396, 77 Am. Dec. 303. If the jury believed, from the evidence, that there had been a sale and delivery of the lumber to De Camp, then the latter was authorized to procure the bill of lading in his own name as shipper and owner, and a subsequent failure to pay the vendors the price he agreed to pay did not divest the title thus acquired. Bearing in mind that we are dealing with a bill of lading that is only assignable, and not negotiable, according to the terms contained upon its face, when De Camp came into possession of that muniment of title and assigned it to the bank the latter acquired by the assignment precisely the title which De Camp on that day himself had.

A bill of lading represents the goods described in it. 6 Cyc. 426. Bills of lading, by the law merchant, are representatives of the property for which they have been given, and the indorsement and delivery of a bill of lading transfers the property from the vendor to the vendee, is a complete legal delivery of the goods, divests the vendor's lien. * * * But, though the vendor's lien is thus divested by reason of the complete delivery of the indicia of property, he may, if the goods have not yet reached the actual possession of the buyer, and if no third person has acquired rights by obtaining a transfer of the bill of lading from the buyer, intercept the goods, in the event of the buyer's insolvency before payment, by the exercise of the right of stoppage in transitu. These principles in relation to the effect of a bill of lading were first conclusively established in the great leading case of *Lickbarrow v. Maso*, 2 T. R. 63, 1 Smith, Lead. Cas. 753; 2 Benj. on Sales, § 1211. In *Midland National Bank v. Mo., Kan. & Texas R. R. Co.*, 62 Mo. App. 531, the following facts appeared: Prior to October 28, 1891, the Currier Commission Company was engaged in the grain and commission business in Kansas City, Mo. It did its banking business with the Midland National Bank, of that place, and had done so for several years. The commission company, not having sufficient funds of its own to carry on business to its satisfaction, arranged with the bank for accommodations, which

were represented by notes and overdrafts, and it was a part of the agreement for credit, by which the amount of the indebtedness of the commission company to the bank should be secured, that the company would pledge all original shippers' bills of lading and elevator receipts. During the months of July, August, and September, 1891, one Follansbee, a purchasing agent of the Currier Commission Company, shipped at different times from Burlington, Kan., over the Missouri, Kansas & Texas Railroad, three cars of corn and two of flaxseed. The former were consigned to Kansas City, "shipper's order," with instructions to notify Currier Commission Company, Kansas City; and the latter were consigned to Chicago, "shipper's order, notify Currier Commission Company"; and so the bills of lading were made out. In payment Follansbee drew his drafts on the Currier Commission Company, and attached to each draft the proper bill of lading. When the drafts and bills of lading made their appearance in Kansas City, the Currier Commission Company paid them by its checks on the Midland Bank, and then placed those bills of lading with the bank, to be held as collateral. When the five car loads of corn and seed reached Kansas City the railroad company delivered the same to the Currier Commission Company, or, which was the same thing, at Currier's request, rebilled them to other points, without the production or surrender of the bills of lading. On October 28th the Currier Company failed in business, and at the time owed the plaintiff bank in excess of the collaterals. Thereupon the bank demanded the grain and seed called for by the bills of lading, but the railroad company was, of course, unable to produce them because they had already been rebilled to other parties. Suit was then brought by the bank against the railroad company. The bills of lading had stamped on their face the words "Not negotiable." The court said: "When Follansbee, the shipper, indorsed and delivered the bills of lading to the Currier Commission Company, it became the owner thereof, with full power of disposition; and while so the owner it had the absolute right, by the transfer of those bills of lading, to convey its title to the plaintiff bank. And this was done. The delivery of the bills of lading to the bank effected a pledge of the property to the same extent and with the same validity as if it had been actually delivered. The bills of lading were symbols of the grain—represented it—and their transfer by delivery stood as an actual change in the possession of the grain itself. The plaintiff bank held the property as collateral security for the advances made to the Currier Company, and, so far as it was necessary to the holder's self-protection, plaintiff had the legal title, and was vested with all the rights and remedies of a purchaser for value. Porter on Bills of Lading, § 510 et seq.; Hutch. on Carriers, § 129; Dymock v. R. R., 54 Mo. App. 400. The words 'Not negotiable' stamped on the face

of the bills of lading in no wise destroyed their assignability. The sole effect of these words was to exempt such bills of lading from the provisions of our statute in relation thereto. Section 745, Mo. Rev. St. 1889; *Dymock v. R. R.*, supra. They are to be treated, then, as at common law." It is said by the Supreme Court of Indiana in the case of *Moore v. Moore and Others*, 112 Ind. 152, 13 N. E. 673, 2 Am. St. Rep. 170, to be familiar law "that if the owner, although induced thereto by fraud, invests another with the apparent legal title to cattels in pursuance of a contract, the person so clothed may transfer an unimpeachable title to a good faith purchaser." The same court in the case above cited stated further: "We are unable to discover any good reason for a distinction in that regard between chattels and such instruments as may be assigned by indorsement so as to give the assignee a complete legal title. The more modern rule upon the subject under consideration seems to be that, where the owner of things in action, although not technically negotiable, has clothed another, to whom they are delivered in the method common to all mercantile communities, with the usual apparent indicia of title, he will be estopped from setting up against a second assignee, to whom the securities have been transferred for value, and without notice, that the title of the first assignee was not perfect and absolute. 2 Pomeroy's Eq. § 710; *Burton's Bill*, 93 Pa. 214."

We have said that the bank acquired by the assignment of the bill of lading precisely the title that De Camp had to the lumber on the day the transfer was made. But it is insisted that De Camp obtained possession of the lumber by fraud, and therefore that he got no title to it at all, and consequently could give none to the bank. If it be conceded that he did secure the lumber by fraud, still if the bank was ignorant of the fraud, and took the bill of lading in good faith and for value, it acquired an unassailable title, even as against the defrauded vendor. That proposition has been distinctly settled in *Hall v. Hinks et al.*, 21 Md. 417. It is there said: "All the authorities agree that, although as between the original parties a sale and delivery of goods obtained by fraud is void (voidable), and may be rescinded at the election of the vendor, and the property reclaimed from the fraudulent vendee, yet if they have passed into the hands of a bona fide purchaser without notice he takes a good title, which cannot be impeached by the defrauded vendor. It is not necessary to cite authorities in support of this proposition. We have said there is no conflict upon this question, and the principle has been recognized by the Court of Appeals expressly in *Powell v. Bradlee*, 9 Gill & J. 221, and incidentally in *Ratcliffe v. Sangston*, 18 Md. 390." The principle which lies at the root of this doctrine is a very familiar one. It is a general and just rule that when a loss has happened which must fall upon one of two innocent persons it must be borne by

him who has occasioned the loss, even without any positive fault committed by him, but more especially if there has been any carelessness on his part which has caused or contributed to the misfortune. *Somes v. Brewer*, 2 Pick. 190, 13 Am. Dec. 406. An illustration of the application of this doctrine is found in *Eversole v. Maull*, 50 Md. 95, and *Dias v. Chickering*, 64 Md. 349, 1 Atl. 709, 54 Am. Rep. 770. If the jury should believe that the bank acted in good faith in discounting the draft for De Camp and accepting the bill of lading as collateral security, and if *Atkins Bros.*, by putting it in the power of De Camp to deal with the property as his own, enabled him to mislead the bank, and if in consequence of their confidence in him and the credit of one day which they gave him a loss must fall either upon the bank or upon them, then, wholly aside from all questions respecting the negotiability of the bill of lading, the doctrine imposing the loss upon the persons by whose carelessness De Camp was enabled to represent to the bank that the property was his, that loss thus occasioned by that representation must fall upon them. There was no right of stoppage in transitu if the bank had acquired title to the lumber.

The prayer presented by the appellant was wrong because it ascribed to the bill of lading the characteristics of a negotiable instrument, whereas by its terms it was declared to be nonnegotiable. The prayer granted at the instance of the appellee was wrong because it denied a recovery on any ground, inasmuch as the bill of lading was declared to be nonnegotiable. The prayer, in effect, withdrew from the consideration of the jury all the facts relative to the acquisition of title to the lumber by the bank because it made no reference to those facts at all. In *Corbett v. Wolford*, 84 Md. 426, 35 Atl. 1088, this court said: "A prayer instructing the jury that the plaintiff is entitled to recover provided they find certain facts withdraws from the jury the consideration of all facts other than those mentioned, and if, from such excluded facts, the jury would be justified in drawing a conclusion different from that which the prayer requires them to find, it is error to grant such a prayer." The evidence excepted to in the first bill of exception was admissible for the reasons that we have heretofore given in dealing with the prayers. Under the instruction granted, the jury returned a verdict for the defendant, the appellee, and a judgment was entered in its favor thereon, and from that judgment this appeal was taken. For the error committed in granting the appellee's prayer the judgment must be reversed, and a new trial will be awarded.

Judgment reversed, with costs above and below, and a new trial awarded.

FAULKNER v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, Suffolk, Jan. 6, 1905.)

[72 N. E. Rep. 976.]

Injury to Passenger—Fall of Window—Inference That Window Was Not Raised Sufficiently—Rebuttal.

Where, in an action for injuries to a passenger caused by the fall of a car window when the train started, the evidence authorized an inference that when the window was put up, and the bolt released to keep it up, the window was not raised high enough for the bolt to be shot clear over its rest, the testimony of a witness that his window was up as high as it would go, and that the window in question appeared to be equally high, did not overcome the inference.

Same—Same—Liability.*

In an action for injuries to a passenger caused by the fall of a car window when the train started of its usual motion, it appearing that the window and attachments were in good order, and that the fall must have been due to it not having been properly fastened, and there being no evidence that defendant's employees raised the window, plaintiff could not recover.

Exceptions from Superior Court, Suffolk County; Wm. Schofield, Judge.

Action by one Faulkner against the Boston & Maine Railroad. Judgment in favor of defendant, and plaintiff brings exceptions. Exceptions overruled.

Gargan, Keating & Brackett, for plaintiff.
Archibald R. Tisdale, for defendant.

LORING, J. We are of opinion that the judge was right in directing a verdict to be rendered for the defendant.

Taking the plaintiff's evidence, all that appears is that the window fell when the train started with its "usual motion." There was no evidence of a defect in the catch or in the window. When put up, the window was kept up by a bolt which rested on a metallic rest on the window jamb; this bolt was attached to the sash, and was drawn back by pressing a spring; when the spring was released, the bolt flew out to its full length onto the rest. The plaintiff has argued that the testimony of Greim, who raised the window to release the plaintiff's fingers, warranted a finding that the window sash was loose in the window jambs, so that it moved from side to side more than it should have; and that this warranted the further finding that this was the reason why the window fell and caused the injuries here complained of. But we do not think that Greim's testimony can bear that construction. The answer to the question put by the defendant's counsel makes it plain (if it was not plain before) that the window

*See foot-notes appended to *St. Louis Southwestern Ry. Co. of Texas v. Parks (Tex.)*, 11 R. R. R. 688, 34 Am. & Eng. R. Cas., N. S., 688.

Pennsylvania Co. v. Coyer

jammed vertically, not horizontally, until the plaintiff's fingers were released. The case which the plaintiff proved, therefore, was the falling of a window in good order on the train's starting with the usual motion. The only inference is that, when the window was put up and the bolt released to keep it up, the window was not raised high enough for the bolt to be shot clean over its rest; in other words, that the cause of the accident was negligence in raising the window when it was opened. The testimony of Greim that his window was up as high as it would go, and the window in question appeared to be equally high, does not cover this point. If a window is up so that the bolt holds the window by being more or less in contact with the rest, without lying on it fully, the difference in height would not be apparent between the lower part of the sash of that window and that of a window next it which was entirely up. There was nothing in the evidence introduced by the defendant which helped the plaintiff.

In this case, therefore, there being no evidence that the window was raised by the defendant's employees, and not by a passenger, the case comes within *Kendall v. Boston*, 118 Mass. 234; *Wadsworth v. Boston Elevated Railway*, 182 Mass. 572, 66 N. E. 421.

Exceptions overruled.

PENNSYLVANIA CO. v. COYER.

(Supreme Court of Indiana, Dec. 13, 1904.)

[72 N. E. Rep. 875.]

Death by Wrongful Act—Interest in Life of Decedent—Complaint.

Under Burns' Ann. St. 1901, § 285, providing for an action for wrongful death, and that the damages shall inure to the benefit of the widow or widower and children, if any, or next of kin, the complaint in an action for the death of an unmarried man, alleging that he left a mother, brothers, and sisters, naming them, sufficiently shows the interest in the life of decedent in the persons so named.

Person Riding in Caboose—Care Due.*

Where a person is allowed by a railroad company to ride in the caboose of its work train gratuitously, the company is bound to exercise ordinary care for his safety.

Same—Injuries—Right to Recover—Burden of Proof.

All persons are required to take notice that railroad work trains are not intended for the transportation of passengers, and to recover for injuries to a person while traveling on such train it must be shown that he was rightfully there, and that the company owed him the duty of carrying him safely.

Same—Same—Same—Waiver of Rule.

Where decedent, an employee of a construction company, received notice from a railroad company of a rule prohibiting the employees of

*As to the care due licensees, see foot-note appended to *Lovett v. Gulf, C. & S. F. Ry. Co. (Tex.)*, 11 R. R. R. 339, 34 Am. & Eng. R. Cas., N. S., 339, where all the preceding authorities in this series are collected.

Pennsylvania Co. v. Coyer

such construction company from riding on a work train, the habitual disregard of such rule by such employees and the trainmen in charge of the work train will not render the railroad company liable for the death of decedent, in the absence of proof that the company had knowledge of such disregard, and acquiesced therein.

Right to Ride on Train—Presumption.

The mere fact that a person is on a railroad train does not necessarily raise the presumption that he is there rightfully.

Appeal from Circuit Court, Porter County; W. C. McMahan, Judge.

Action by Delphine Coyer, administratrix, against the Pennsylvania Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under Act March 13, 1901 (Acts 1901, p. 590, c. 3; Burns' Ann. St. 1901, § 1337u). Reversed.

Zollars & Zollars, for appellant.

T. H. Heard, for appellee.

DOWLING, C. J. Action by the appellee, as administratrix of the estate of Charles Coyer, deceased, against the appellant, the Pennsylvania Company, for damages for a personal injury resulting in the death of Coyer. Demurrer to each paragraph of complaint overruled. Answer in denial. Trial by a jury. Verdict for appellee, with answers to interrogatories. Motion for judgment on special answers and for a new trial overruled. Judgment on verdict. All questions discussed in brief of counsel for appellant are properly presented by the assignment of errors.

The complaint charged that the death of Charles Coyer, appellee's decedent, was caused by the wrongful act and omission of the appellant. Each of its three paragraphs alleged, among other things, that Coyer, an employee of a firm engaged in the construction of a second track for appellant, "after working hours, * * * as had been his custom, and with the consent of defendant company, did go upon and board defendant's work train," etc., "and with the knowledge and consent of the defendant and its employees in charge of said train did climb in and upon the caboose of said work train * * * for the purpose of being carried to his home in the city of Plymouth; * * * that the said Charles Coyer was twenty years old, strong, active, able-bodied, and intelligent, and capable of earning ninety dollars per month, and did so long before and at the time of his death; that * * * more than a year prior to his death he was fully emancipated and given his time by his mother (a widow), and allowed to do business for himself; that he used and did as he pleased with his wages, and collected and received the value of his services; * * * that the said Charles Coyer * * * died intestate, leaving as his only heirs at law and next of kin his mother, Delphine Coyer, and his brothers, Peter Coyer, William Coyer, and George

Coyer, and his sisters, Emma Carter, Neoma Coyer, and Ida Coyer."

The first objection to the complaint by counsel for appellant is that it does not show that the next of kin suffered any injury for which the law will award damages. The action is founded upon section 285, Burns' Ann. St. 1901, which authorizes the personal representative of one whose death is caused by the wrongful act or omission of another to maintain an action therefor in certain cases, and which provides that the damages must inure to the exclusive benefit of the widow or widower (as the case may be) and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased. It has never been held in this state that the complaint must show the fact that the widow, widower, children, or next of kin of the deceased had a pecuniary interest in his life, or the nature or extent of that interest. This court said in the case of the Indianapolis, etc., R. R. Co. v. Keely's Adm'r, 23 Ind. 131, 136, 137, that: "In New York, under a statute conferring the same right of action on the personal representative of the deceased person, 'the sum recovered to be for the exclusive benefit of the widow and next of kin,' it has been held that the complaint should show that 'there are persons entitled by law to claim the indemnity,' and that their names should be stated. *Safford v. Drew*, 3 Duer, 627. The New York statute may furnish one reason why the persons entitled to the damages recovered should be named in the complaint that does not exist under our statute, in this: The statute of New York provides that 'the jury may give such damages as they shall deem a fair and just compensation, not exceeding \$5,000, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of the deceased person.' A different rule seems to prevail under our statute. See *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72. In view, however, of the whole question, we think the better rule of practice requires that the names of the persons and their relation to the deceased should be stated in the complaint. It imposes no hardship on the plaintiff, and only requires to be stated in the complaint the facts that must be proved on the trial to justify a recovery." Again, in the *Jeffersonville, etc., R. R. Co. v. Hendricks' Adm'r*, 41 Ind. 48, 77, this court said that: "We are of the opinion that it will be sufficient to allege in the complaint and prove on the trial that there are persons who are entitled under the statute to the damages. We hold that it is not necessary to give the names of such persons in the complaint, but such allegation would not vitiate." It was averred in the complaint under review that the deceased was unmarried, that he died intestate, and that he left surviving him, as his heirs at law and next of kin, his mother and brothers and sisters, naming each of them. This was a sufficient allegation of interest in the life

Pennsylvania Co. v. Coyer

of the deceased in the persons so named and described, and it authorized proof of such pecuniary loss as the persons so related sustained by his death. This view seems to be entirely in harmony with the authorities. *Stewart, Adm'r, v. The Terre Haute, etc., R. R. Co.*, 103 Ind. 44, 2 N. E. 208; *The Louisville, etc., Ry. Co. v. Goodykoontz*, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371; *The Commercial Club v. Hilliker*, 20 Ind. App. 239, 242, 243, 50 N. E. 578; *The Salem Bedford Stone Co. v. Hobbs, Adm'r*, 11 Ind. App. 27, 38 N. E. 538; *The State ex rel. Meriwether, Adm'r, v. Walford*, 11 Ind. App. 392, 39 N. E. 162; *Conant v. Griffin*, 48 Ill. 410; *McGlone v. New Jersey, etc., Co.*, 37 N. J. Law, 304; *Keller v. New York Cent. R. Co.*, 24 How. Prac. 172; 5 Encyl. Pl. & Pr. 868, 869, 870; *Cincinnati, etc., R. R. Co. v. Carper*, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144, and notes; *Alabama R. R. Co. v. Yarbrough*, 83 Ala. 238, 3 South. 447, 3 Am. St. Rep. 715.

It is next contended that the complaint does not show that Coyer was a passenger, nor that he was otherwise rightfully upon the train, so as to make appellant liable upon the ground of negligence. It does appear that he was not an employee of the appellant, and the averment is that he was in the habit of riding upon the train, and was in the caboose with the knowledge and consent of the defendant company for the purpose of being carried to his home. If he was on the work train with the knowledge and consent of the appellant for this purpose, he was neither a trespasser, a licensee, nor a servant of the company. Although he paid no fare, he was a person carried gratuitously, and the appellant was bound to exercise at least ordinary care for his safety. *Gillenwater v. The Madison, etc., R. R. Co.*, 5 Ind. 339, 61 Am. Dec. 101; *The Louisville, etc., Ry. Co. v. Faylor*, 126 Ind. 126, 130, 25 N. E. 869; *Cleveland, etc., R. R. Co. v. Ketcham*, 133 Ind. 346, 33 N. E. 116, 19 L. R. A. 339, 36 Am. St. Rep. 550; *Ohio, etc., R. R. Co. v. Selby*, 47 Ind. 479, 17 Am. Rep. 719; *Ohio, etc., R. R. Co. v. Nickless*, 71 Ind. 271; *Rosenbaum v. St. Paul, etc., R. R. Co.*, 38 Minn. 173, 36 N. W. 447, 8 Am. St. Rep. 653; *St. Joseph, etc., R. R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461; *Chicago, etc., R. R. Co. v. Frazer*, 55 Kan. 582, 40 Pac. 923; *Keating v. Michigan Cent. R. R. Co.*, 97 Mich. 154, 56 N. W. 347, 37 Am. St. Rep. 328; *Lawrenceburgh, etc., R. R. Co. v. Montgomery*, 7 Ind. 474; *Ohio, etc., R. R. Co. v. Dickerson*, 59 Ind. 317; *Ohio, etc., R. R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336; *Hazard v. Chicago, etc., R. R. Co.*, 1 Biss. (U. S.) 503, Fed. Cas. No. 6,275; *Fitzpatrick v. The New Albany & Salem R. R. Co.*, 7 Ind. 436; *Lake Shore, etc., R. R. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510; *McGee v. Missouri Pac. R. R. Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706. The demurrer to the complaint was properly overruled.

While many of the special answers of the jury were appar-

Pennsylvania Co. v. Coyer

ently antagonistic to the general verdict, they were not irreconcilable with it. Evidence might have been introduced under the issues which would have rendered them consistent with the conclusion that the appellee was entitled to recover upon the pleadings. *Princeton, etc., Coal Co. v. Roll*, 162 Ind. 115, 120, 121, 66 N. E. 169; *Albany Land Co. v. Rickel*, 162 Ind. 222, 228, 70 N. E. 158.

Did the court err in overruling appellant's motion for a new trial? One of the reasons assigned for the motion was that the verdict was not sustained by sufficient evidence. It will not be necessary to set out or consider the evidence in detail, as we think there was a failure of proof upon a vital point, which must cause a reversal of the judgment. The complaint, as we have seen, alleged that Coyer, with the consent of the appellant, went upon the work train with the permission of appellant's servants in charge of said train, the custom being to convey Coyer and other employees of P. T. Clifford & Sons, the contractors, to and from their work. It was proved without contradiction that a rule of the appellant expressly prohibited the employees of P. T. Clifford & Sons from riding on the work train without the special permission of the superintendent, and it was shown that notice of the existence of this rule was given to Coyer some time in the year 1900, and within one year before the occurrence of the collision by which he was killed. Work trains are not ordinarily intended for the transportation of passengers, and it is a generally recognized fact that the perils of accident are much greater on such trains than on those designed and commonly used for the conveyance of passengers. A railroad company has the right and the strongest reason to protect itself against the dangerous liability likely to arise from accidents to such trains by altogether excluding passengers from them; and the most reasonable and effective method of accomplishing this result would seem to be the adoption and promulgation of a rule prohibiting all persons from riding on work trains. When such a rule is made, and notice is given to the persons intended to be excluded from the train or trains, it is not necessary that these persons should afterward be reminded of the existence of the rule. After notice that they are not permitted to ride on such trains, if they violate the rule, they do so at their own risk, and, if injured by an accident to the train, ordinarily there can be no recovery. Disregard of the rule and a failure to enforce it by the conductor or other persons having charge of the train will not render the company liable for an accidental injury. All persons are required to take notice of the fact that work trains are not intended for the transportation of passengers, and persons traveling on them, if injured and seeking damages, must show that they were rightfully there, and that the company owed them the duty of carrying them safely. Much more, after express notice of a rule of the company prohibit-

Pennsylvania Co. v. Coyer

ing them from riding on such trains, is it incumbent on them, if they seek to make the company responsible for an injury, to show by clear and satisfactory evidence that the rule had been abrogated, and that the plaintiff was rightfully on the train? Nothing of the kind appears in the present case. There was proof that the persons in charge of the work train violated the rule prohibiting the employees of P. T. Clifford & Sons from riding on the cars, but there was no evidence that such disregard of the rule, whether occasional or habitual, was known to the appellant, or that it occurred under such circumstances as to raise a presumption of knowledge of such disregard of the order and acquiescence of the appellant in it. On the contrary, the evidence that the company had no such knowledge was uncontradicted. No rule of law imposes upon a railroad corporation the duty of maintaining a constant surveillance upon its employees to ascertain whether or not its rules are complied with. It has the right to assume that they will be observed and enforced, and it is rarely the case that notice of a habitual disregard of such rules and acquiescence in such breach of duty can justly be presumed from evidence that violations of the rules have occurred, or have been connived at by faithless servants. *Murray v. Fry*, 6 Ind. 371; *Rapp v. Kester*, 125 Ind. 79, 25 N. E. 141; *Streets v. The Grand Trunk Ry. Co. (Sup.)* 78 N. Y. Supp. 729; *Springer v. Byram*, 137 Ind. 15, 36 N. E. 361, 23 L. R. A. 244, 45 Am. St. Rep. 159; *Cooper v. Lake Erie, etc., R. R. Co.*, 136 Ind. 366, 36 N. E. 272; *Evansville, etc., R. R. Co. v. Barnes*, 137 Ind. 306, 36 N. E. 1092; *Smith v. Louisville, etc., R. R. Co.*, 124 Ind. 394, 24 N. E. 753; *White v. The Evansville, etc., R. R. Co.*, 133 Ind. 480, 33 N. E. 273; *Lake Shore, etc., R. R. Co. v. Foster*, 104 Ind. 293, 316, 4 N. E. 20, 54 Am. Rep. 319; *Stalcup v. Louisville, etc., Ry. Co.*, 16 Ind. App. 584, 45 N. E. 802.

Many of the instructions given by the court are complained of as erroneous. The nineteenth was in these words: "It is charged in the complaint that while said Charles Coyer worked for P. T. Clifford & Sons upon the right of way of the defendant company west of Plymouth, the defendant company provided and furnished to him and other employees working for said Cliffords transportation between Plymouth and said work upon its cars and trains; that upon the invitation and consent of the defendant company said Charles Coyer went upon and aboard one of the defendant's work trains to be carried from the work to Plymouth; that he had a right to do so; and that while on one of said work trains he was killed by the negligence of the employees handling that train and another train with which it collided. The simple fact that Charles Coyer was killed upon one of the work trains belonging to the defendant and being operated by its employees does not show, nor tend to show, that said Coyer was by the defendant invited to be upon said train.

Nor will the simple fact that Charles Coyer was killed while at work upon a train of the defendant, which was operated by its employees, alone prove, nor tend to prove, that he was upon that train with the consent or knowledge of the defendant. But the court instructs the jury that a person found upon a train, whether it be a passenger, freight, or work train, is presumed to be there rightfully." The latter part of this instruction, namely, "that a person found upon a train, whether it be a passenger, freight, or work train, is presumed to be there rightfully," is not a correct declaration of the rule of law in such cases. It is said in *Elliott on Railroads*, § 1578, that: "The presumption that a person on a train is a passenger does not prevail in cases where the train is one on which passengers are not ordinarily carried; as, for instance, a construction train, an oil train, or the like. It has been held, and, in our opinion, justly so held, that a person in the caboose of a freight train cannot be presumed to be a passenger; but it may, of course, be shown that passengers were carried on such train." *Eaton v. The Delaware, etc., R. R. Co.*, 57 N. Y. 382, 389, 15 Am. Rep. 513; *Atchison, etc., R. R. Co. v. Headland* (Colo.) 33 Pac. 185, 20 L. R. A. 822; *White v. Evansville, etc., Ry. Co.*, 133 Ind. 480, 486, 33 N. E. 273.

Graham v. Toronto, Grey & Bruce Railway Co., 23 Up. Can. 514, cited by the court in *Hoar v. Maine Cent. R. R. Co.*, 70 Me. 65, 25 Am. Rep. 299, is much in point upon the question we are now considering. There the defendants agreed with the contractor for the construction of their railway to furnish a construction train for ballasting and laying the track for a portion of their road then under construction; the company to provide the conductors, engineer, and fireman; the contractors to furnish the brakemen. On October 31, 1872, after work for the day was over, and the train was returning to Owen Sound, where the plaintiff, one of the contractor's workmen, lived, the plaintiff, with the permission of the conductor, but without the authority of the defendant, got on. Through the negligence of the person in charge of the train an accident happened, and the plaintiff was injured. In deciding the case, *Hogarty, C. J.*, said: "The fact that the defendant's engine driver or conductor allowed him to get on the platform, does not alter my view of the case. I cannot distinguish it from the case of a cart sent by its owner under his servants' care to haul bricks or lumber for a house he is building. A workman, either with the driver's assent, or without any objection from him, gets upon the cart. It breaks down, or by careless driving runs against another vehicle or a lamp post, and the workman is injured. I cannot understand by what process of reasoning the owner can, in such case, be held to incur any liability to the person injured; nor, in my opinion, would the fact that the owner was aware that the driver of his cart often let a friend or a person doing

Pennsylvania Co. v. Coyer

work at his house ride in his cart, make any difference.

* * * It could never be, I think, in the reasonable expectation of these defendants, that they were incurring any liability as carriers of passengers, or that they should provide against contingencies that might affect them in that character. A similar question arose in *Sherman v. Toronto, Grey & Bruce Railway Co.*, 34 Up. Can. 451, where one of the workmen was being carried, without reward, on a gravel train, and was injured so that he died. It was held that the deceased was not lawfully upon the car with the consent of the defendant, and a nonsuit was directed. "The workmen," observes Wilson, J., "were not lawfully upon the cars. They were not passengers being carried by the defendants. They were acting on their own risk, not at the risk of the defendants; and, however unfortunate the disaster may have been, it is only right the legal responsibility should fall on those who ought to bear it, and not upon those upon whom it does not rest. In this case it appeared that it was not necessary the defendants should carry the men to and from their work, and that they never agreed to do more than to provide cars for carrying ballasting and material for track laying. * * *

No one becomes a passenger except by the consent, express or implied, of the carrier." In *Duff v. Allegheny Valley R. Co.*, 91 Pa. 458, 36 Am. Rep. 675, the facts were that the conductor of an accommodation train, at the request of a brakeman, permitted a lad of 15 to ride free, daily, on the train, to sell newspapers. Under the company's rules this was beyond the scope of the conductor's authority. After this practice had continued five or six months, the boy was killed in an accident to the train, caused by the alleged negligence of the company. In an action by the boy's mother to recover damages it was held that under the evidence the boy was neither a passenger nor an employee, but was a mere trespasser, to whom the company owed no duty, and that the plaintiff could not recover. *Springer v. Byram*, 137 Ind. 15, 27, 36 N. E. 361, 23 L. R. A. 244, 45 Am. St. Rep. 169; *Elliott on Railroads*, § 1580.

Other errors are discussed by counsel for appellant, but we do not deem it necessary to consider them. Many of them relate to instructions given by the court upon the subject of the rights acquired by the deceased by reason of the fact that, when injured, he was traveling on the train of the appellant. Our views upon this branch of the case have been fully stated elsewhere in this opinion, and need not be repeated. So far as the instructions given conflict with them, they must be condemned.

For the error of the court in overruling the motion for a new trial the judgment is reversed, with direction to the court to sustain the motion, and for further proceedings not inconsistent with this opinion.

GILLET, J., did not participate in this decision.

FREMONT, E. & M. V. R. CO. *v.* HAGBLAD.

(Supreme Court of Nebraska, Dec. 7, 1904.)

[101 N. W. Rep. 1033.]

Action against Carrier—Pleading.

Petition examined, and *held* not to state a cause of action *ex contractu* against a common carrier, nor a cause of action at common law for the carrier's negligence.

Passenger—Pleading.

Petition further examined, and *held* not to set forth facts sufficient to constitute the plaintiff a passenger so as to bring him within the provisions of section 10,039, c. 47, p. 2876, Cobbey's Ann. St. 1903.

Injury to Person at Station—Degree of Care.

A railroad company owes only ordinary care to persons impliedly invited upon its platform who are not passengers.

Same—Who Are Prospective Passengers.*

In order to bring a person within the station house or upon the platform of a railroad station within the protection of the legal duties owing by a common carrier to its passengers, a person intending to become a passenger must go to the station at a reasonable time before the time fixed for the departure of the train upon which he intends to take passage, in a proper manner, and there, either by the purchase of a ticket or in some other manner, indicate to the carrier his intention to take passage and thus place himself in the carrier's charge.

Same—Right of Action—Statute.

In order to state a cause of action upon the statutory duty of a railroad company to a passenger who has not actually taken passage upon the train, it is necessary that the facts stated show that the person suing is one of a class of persons to whom the remedy is afforded by the statute. To plead that he is a passenger in a case where the existence of such relation to the carrier is at issue, pleads a mere conclusion of law, and is not sufficient.

Who Are Passengers.†

From the time a passenger, as defined herein, places himself under the charge of the carrier as he begins his journey, until he is afforded the opportunity to leave the premises of the carrier at its termination, he is "a passenger being transported," unless by some act not attributable to the carrier the relation ceases.

(Syllabus by the Court.)

Commissioners' Opinion. Error to District Court, Holt County; Westover, Judge.

Action by Axsell Hagblad against the Fremont, Elkhorn & Missouri Valley Railroad Company. Judgment for plaintiff. Defendant brings error. **Reversed.**

*As to the care due licensees, see foot-note appended to *Lovett v. Gulf, C. & S. F. Ry. Co.* (Tex.), 11 R. R. R. 339, 34 Am. & Eng. R. Cas., N. S., 339, where all the preceding authorities in this series are collected.

As to the care due persons other than passengers at stations and depots on business, see foot-note appended to *Sullivan v. Minneapolis, St. P. & S. S. M. Ry. Co.* (Minn.), 11 R. R. R. 725, 34 Am. & Eng. R. Cas., N. S., 725.

†As to who are, and who are not, passengers, see foot-note appended to *Radley v. Columbia Southern Ry. Co.* (Ore.), 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153.

Fremont, etc., R. Co. v. Hagblad

Benjamin T. White and J. B. Sheean, for plaintiff in error.

M. F. Harrington and A. F. Mullen, for defendant in error.

LETTON, C. This action was brought by Axsel Hagblad, defendant in error, hereinafter styled "the plaintiff," against the Fremont, Elkhorn & Missouri Valley Railroad Company, plaintiff in error, hereinafter styled "the defendant." Judgment was rendered for the plaintiff below, and the defendant below brings error to this court.

The sole error assigned is that the trial court erred in overruling the defendant's motion for a judgment on the pleading non obstante veredicto. The defendant, by a general demurrer, by reasonable objection to the introduction of evidence upon that ground, by motion for an instruction, and by motion for judgment non obstante veredicto, at every stage of the case challenged the sufficiency of the allegations of the petition to state a cause of action against the defendant. The parts of the petition which are necessary to be set forth in order to state the question involved are as follows: "(1) The plaintiff, for cause of action, alleges that the defendant is a corporation duly organized under the laws of the state of Nebraska, and has been such corporation for ten years last past. That the defendant is a corporation engaged in the railroad business, and for ten years last past it has been a common carrier of passengers for hire upon its railroad, and has owned and operated a line of railroad in the counties of Madison, Antelope, and Holt, in the state of Nebraska. That Norfolk and Meadow Grove are stations upon the defendant's line of railroad in Madison county where it receives and delivers passenger on and from its train, and that the defendant, on the 28th day of December, 1902, was a common carrier carrying passengers from Norfolk to Meadow Grove, and that the station at Norfolk where such passengers are received is commonly known as Norfolk Junction. (2) That on the 28th day of December, 1902, the plaintiff purchased from the defendant at Norfolk, Neb., a ticket entitling him to a safe passage on the defendant's train from Norfolk to Meadow Grove, and insuring him against injury while a passenger on said train, and while a passenger on the defendant's premises at Norfolk. That while plaintiff was standing on the defendant's station platform at Norfolk on the evening of said day, and after he had purchased and paid the defendant for said ticket, and while he was a passenger on the defendant's premises, and while he was waiting for the arrival of the defendant's train which was to carry him from Norfolk to Meadow Grove, he was struck by an engine and cars run and operated upon the defendant's railroad track at Norfolk, and which train was under the direction, and with the knowledge, approval, and consent, of the defendant. That by being struck by said engine and said cars the defendant was

Fremont, etc., R. Co. v. Hagblad

thrown down, mangled, bruised, and injured, and sustained the following injuries."

It will be observed that the petition does not allege that any act was negligently done. If the action had been brought against an individual for damages occasioned by his negligence which resulted in the injuries complained of, it would be essential to allege that the injuries were occasioned by the negligence of the defendant, either by setting forth facts which would constitute negligence as a matter of law, or by pleading generally that the defendant was negligent in performing or omitting to perform the acts complained of as constituting negligence. *Omaha & R. V. R. Co. v. Wright*, 49 Neb. 456, 68 N. W. 618.

The allegations of the petition under consideration do not set forth that the act by which the plaintiff was injured was done negligently, and no fact is alleged which constitutes negligence as a matter of law under the common law, nor by statute unless the plaintiff was one of a class embraced under the provisions of section 10,039, c. 47, p. 2876, *Cobbey's Ann. St. 1903*, relating to injuries to persons while being transported over railroads in this state.

Since the petition was assailed at every stage in the progress of the cause, the pleader will be presumed to have stated his case as fairly to himself as the facts will warrant, and the familiar rule applied that the allegations in the petition, and all presumptions arising therefrom, will be construed against the pleader, and no presumptions in his favor indulged in. Having these rules in mind, therefore, it will be observed that the only allegations of the petition which show the manner in which the plaintiff was injured are that, while plaintiff was standing on defendant's station on the platform at Norfolk on the evening of December 28, 1902, he was struck by an engine and cars run and operated upon the defendant's railroad track, which train was run under the direction, and with the knowledge, approval, and consent, of the defendant. That, by being struck by said engine and cars, the plaintiff was injured. Taking these allegations alone, without the aid of any presumptions, they appear to be somewhat inconsistent. The plaintiff, while standing on the platform, was struck by the engine and cars operated upon the track. The plaintiff stood presumably upon a safe and properly constructed platform, and engine and cars were presumably properly constructed and properly operated, and the track was presumably in good condition for the purpose of its construction. If we accept these facts as true, then, unless the plaintiff was so situated at the time of the accident that though he was standing upon the platform his body projected over the track in such manner that properly constructed and operated engine and cars might strike him, no injury could result. This being the case, the inference must be drawn that, presuming that the defendant

was operating its trains with due care and caution, the plaintiff placed himself in a position that common knowledge would show to be one of danger. We conclude, therefore, that the petition fails to disclose any facts which constitute negligence on the part of the defendant as a matter of law irrespective of the statute, and does not state a cause of action if based upon a common-law liability of the defendant.

The plaintiff contends that the petition states a good cause of action upon three grounds: First, it states a breach of contract to safely convey the plaintiff from the point where he purchased the ticket to the point of destination; second, it states a cause of action under the statute hereinbefore alluded to; third, it states a cause of action on the ground of negligence by stating facts which as a matter of law constitute negligence on the part of the defendant.

As to the first contention, we think it clear that this petition is not based upon contract. No promise, and no consideration therefor, have been alleged. The petition alleges that the plaintiff purchased a ticket. While it is true that a railroad ticket is evidence of a contract between the carrier and the purchaser thereof, still the plea that the plaintiff purchased a ticket for a passage from Norfolk to Meadow Grove, without alleging that the defendant agreed to carry him between these points in consideration of the sum paid, and alleging further a breach of the contract, does not set forth an action *ex contractu*. 15 Ency. Pleading & Practice, p. 1125, and notes. "There is a class of cases arising out of contract, where, by reason of the contract, the law raises a duty, for the breach of which duty an action on the case may be maintained; and in such cases the contract, being the basis and gravamen of the suit, must be alleged and proved. But when the gist of the action is a breach of duty and not of contract, and the contract is not alleged as the cause of action, and when, from the facts alleged, the law raises the duty by reason of the calling of the defendant—as in case of innkeepers and common carriers—and the breach of duty is solely counted upon, the rules applying to action *ex delicto* determine the rights of the parties." *Frink v. Potter*, 17 Ill. 412; *Wright v. Geer*, 6 Vt. 151, 27 Am. Dec. 538; *Bank v. Brown*, 3 Wend. 158; *McCall v. Forsyth*, 4 Watts & S. 179. We conclude, therefore, that the gist of this action under the allegations of the petition is a breach of duty arising from the obligations imposed by law upon common carriers, and that it is not an action upon the contract of carriage.

We have already considered the third ground upon which the plaintiff asserts the petition is sufficient, and decided that his position as to this is unsound. There remains, however, to be considered the contention that the petition states a cause of action under section 10,039, c. 47, p. 2876, Cobbey's Ann. St. 1903, and this presents an important point for consideration. Section 10,039 is as follows: "Every railroad

company as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." The plaintiff contends that under the allegations of the petition he was a passenger, and was injured while being transported over the defendant's railroad, and that, since this fact appears upon the face of the petition, the liability of the company for damages sustained by him is fixed, unless, by proper pleading and proof as to the plaintiff's criminal negligence or violation of some rule or regulation actually brought to his notice, it relieves itself from the burden, and from the conclusive presumption of negligence which is placed upon it by the statute. On the other hand, the defendant insists that a purchaser of a railroad ticket, while standing on a station platform waiting for the arrival of a train on which he intends to take passage, does not come within the class of passengers protected by the statute, and that such a person is not a "passenger being transported" over the carrier's road. And in this connection the defendant calls attention to the fact that the petition does not allege that the plaintiff was injured while attempting to alight from or board his train, or that he had begun his journey by taking passage on the train. It is obvious, therefore, that the determination of the question presented rests upon the inquiry whether a person who has bought a ticket and is upon a station platform awaiting the arrival of a train upon which he intends to take passage is a passenger being transported over its road.

Defendant argues that the common law recognized two classes of passengers, those being transported and those not being transported, and established different degrees of care, and, in case of injury, different rules as to the burden of proof. That, as to the first class, the carrier was bound to exercise the highest degree of care which human skill and foresight could devise, and that an injury done to one of this class arising from defective roadbed, equipment, or management was presumed to have been caused by the negligence of the carrier. That, as to the second class, those not being actually transported, the carrier was only bound to exercise ordinary care, and from an injury to one of this class no presumption of negligence was raised against the carrier. As to the first proposition, there is no difference of opinion worthy of mention. The doctrine that the carrier must exercise the highest degree of care is accepted as the settled rule in nearly all jurisdictions, the reason for this rule being well stated by the Supreme Court of the United States in an early case. *The Philadelphia & R. Ry. Co. v. Derby*, 14 How., 468, 14 L. Ed. 502 (decided in 1852). "When carriers undertake to

Fremont, etc., R. Co. v. Hagblad

convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And, whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.' * * * Any relaxation of the stringent policy and principles of the law affecting such cases would be highly detrimental to the public safety." As to the second proposition, however, the authorities are not uniform, one class of cases following the doctrine as laid down in *Sherman & Redfield on Negligence*, § 501, as follows: "When Ordinary Care only Required.—The requirement of extraordinary care, being founded upon the special risk of human life involved in the business of carrying passengers, is not to be extended to incidents of the business which do not involve such risk, and in which the carrier stands in the same relation to the passenger as do other business men from whom such peculiar care is not required. Hence, while a carrier must use ordinary care to make the means of approach and departure and other accessories safe for the use of passengers, he is not required to use any higher degree of care with reference to these things. Therefore, with regard to platforms, stairs, waiting rooms in a station, the ground surrounding it, and other premises of a railroad company, its obligation to passengers is only one of ordinary care, in common with that of all other occupants of land or buildings inviting persons to enter thereon for compensation, since passengers are no more endangered in such places than they are in similar premises not belonging to a railroad company." *Railway Co. v. Marion*, 104 Ind. 239, 3 N. E. 874; *Kelley v. Railway Co.*, 112 N. Y. 443, 20 N. E. 383, 3 L. R. A. 74; *Laffin v. Railway Co.*, 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433; *Falls v. Railway Co.*, 97 Cal. 114, 31 Pac. 901; *Moreland v. Railway Co.*, 141 Mass. 31, 6 N. E. 225; *Jordan v. Railway Co.*, 165 Mass. 346, 43 N. E. 111, 32 L. R. A. 101, 52 Am. St. Rep. 522; *Stokes v. Railway Co.*, 107 N. C. 178, 11 S. E. 999; *McDonald v. Railway Co.*, 26 Iowa, 124, 95 Am. Dec. 114; *Railway Co. v. Reeves*, 116 Ga. 743, 42 S. E. 1015. The other class of cases hold in the main that the carrier's duty to a passenger is the exercise of the highest care at all times that the relation subsists, from the time that a person becomes a passenger until he ceases to be such, his journey is completed, and he has left the carrier's premises. A few of the cases holding the carrier to the same degree of care, with reference to a person who has become a passenger, from the time he assumes such relation until within a reasonable time after his alighting from the train and departure from the platform or station at his destination, are as follows: *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208, 97 Am. Dec. 96;

Fremont, etc., R. Co. v. Hagblad

Grand Rapids & I. R. Co. v. Martin, 41 Mich. 667, 3 N. W. 173; Knight v. Portland S. & P. R. Co., 56 Me. 234, 96 Am. Dec. 449; Warren v. Fitchburg R. Co., 8 Allen, 227, 85 Am. Dec. 700; Webster v. Fitchburg R. Co. (Mass.) 37 N. E. 165, 24 L. R. A. 521; Dodge v. Boston & B. S. Co., 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541; Weston & N. Y. Elev. R. Co., 73 N. Y. 595; Norfolk & Western R. R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935; Burke v. Chicago & N. W. R. Co., 108 Ill. App. 565; Krantz v. R. G. W. Ry. (Utah) 41 Pac. 717, 30 L. R. A. 297; Johns v. C. C. & A. R. Co. (S. C.) 17 S. E. 698, 20 L. R. A. 520, 39 Am. St. Rep. 709.

The question as to which of these two rules governs the liability of railroads for injuries to passengers upon their station platforms or premises in this state, as presented by the pleading in this case, depends upon the proper construction to be given to the phrase "a passenger while being transported over its road." If the intention of the Legislature was that this phrase should be construed literally, then a passenger not actually in process of being moved or carried from one point to another would not be within the protection of the statute. This court, however, has recently had occasion to construe this phrase to some extent. In the case of Chicago, R. I. & P. R. R. Co. v. Sattler (Neb.) 90 N. W. 649, 67 L. R. A. 890, this provision is discussed with reference to the facts in that case where a passenger left the train on his own volition for a purpose not incident to the journey. In that case it is said: "We are agreed that the words 'while being transported over its road' is a qualifying phrase, intended to limit liability on the part of the company, and that we must give it the force intended by the Legislature. We cannot, however, agree with the plaintiff in error that it was intended to exclude all passengers who leave the car provided for them by the carrier. It is well known that many, perhaps most, roads provide eating houses and other accommodations for the comfort or convenience of their patrons, and that regular stops are made for meals, requiring the passengers to leave the car in which they are being transported, and often to cross numerous tracks on their way to and from the car to the dining room or restaurant. In such cases one does not lose his character as a passenger in the course of transportation over the road, or the protection of the statute. The duty of the company to provide him safe egress and ingress for such necessities as are required on his journey, and which the road assumes to furnish, and which it invites him to partake of, is no less stringent than to furnish him safe passage on its cars. While seated in the dining room of the company he is under its control, and must conform to its rules, as fully as while on the train; and while thus subject to the rules and regulations of the company he is their passenger, entitled to like protection from damage

from the operating of the road as while seated in the car, proceeding on his journey. We believe and hold that it was intended to include in the words 'while being transported over its road' all passengers actually on the train, whether the same is in motion or standing on any part of the road; and it further includes those passengers leaving the train for any necessary purpose incident to their journey, such as a change of cars, or to procure refreshments at any point where the same is furnished by the company, and where an express or implied invitation is extended to the passengers to leave the car for that purpose." The phrase, then, is not in all cases to be literally construed.

If a person who has left the train for any necessary purpose incident to the journey, such as to procure refreshments at a point where the same is furnished by the company, is, while upon the platform on his way to the eating house, and during his return to the train, "a passenger being transported" within the contemplation of the statute, is not the intending passenger who has purchased his ticket, and who may walk side by side with him upon the station platform on his way to the same coach, equally a passenger being transported? He is upon the company's premises furnished to him for the purpose of procuring his ticket and giving him access to the train, and has begun his journey. Should an injury occur to both, can one rule be applied to an action brought by the passenger who was returning from the dining room to the train, and another rule to the passenger who was walking with him from the waiting room or ticket office to the same train? Further than this, how can a reasonable distinction be drawn between the duty of the railroad company to the passenger sitting in a train about to move from the station, and a passenger upon the platform, or in the station house, ready to take the train and begin his journey?

It is argued in the defendant's brief that the Legislature, in adopting the language of the courts when defining the class of passengers entitled to the highest degree of care, adopted the same meaning and construction as was given to that language by those courts. But, as we have seen, the courts are not uniform in their holdings in this respect, and, from the whole course of legislation and judicial construction within this state, we believe that the Legislature, by the use of the language quoted in the section under consideration, intended no more and no less than that every individual to whom the carrier owed the care due a passenger should, as long as the relation existed, be within its terms, but that when the relation ceased, either by voluntary disregard of reciprocal rights and duties of the passenger, as in the Sattler Case, or by disregard of the reasonable rules and regulations of the carrier on the part of the passenger, or by his criminal negligence, the carrier becomes absolved upon his part from the presumption of negligence created by the statute; or, to place

Fremont, etc., R. Co. v. Hagblad

the idea in other words, that from the time the intending passenger places himself under the charge of the carrier, as he begins his journey, until he is afforded the opportunity to leave the premises of the carrier at its termination, he is "a passenger being transported," unless, by some act not attributable to the carrier, the relation ceases.

When does the relation of carrier and passenger begin? With but minor differences depending upon the circumstances in each particular case, the courts are generally agreed upon this point. The general rule seems to be that where a person intending to take passage upon a train goes into a station within a reasonable time prior to the hour of departure of the train, in a proper manner, and there, either by the purchase of a ticket or in some other manner, indicates to the carrier his intention to take passage, from that time on, while waiting for his train, he is entitled to all the rights and privileges of a passenger. In *Elliott upon Railroads*, p. 2459, note 1, it is said that the true doctrine is announced by the Supreme Court of Massachusetts in *Webster v. Fitchburg R. Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521. In that case a person who held a ten-trip ticket was struck and killed by a train when he was running rapidly from the direction of the public street, across the defendant's premises outside of the passenger station, to the track on which was an incoming train, apparently with a view to take another train which was about to start for Boston on the track beyond. It was contended that, inasmuch as he had previously obtained a ticket, and was on the defendant's premises in a place designed for the use of passengers outside of the station, and was about to take a train, he had become a passenger. The court, however, says: "One becomes a passenger on a railroad when he puts himself into the care of the railroad company to be transported under a contract, and is received and accepted as a passenger by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one has offered himself to be carried on a trip about to be made, and that the other has accepted his offer, and has received him to be properly cared for until the trip is begun, and then to be carried over the railroad. A railroad company holds itself out as ready to receive as passengers all persons who present themselves in a proper condition, and in a proper manner, at a proper place, to be carried. It invites everybody to come who is willing to be governed by its rules and regulations. In a case like this, the question is whether the person has presented himself in readiness to be carried, under such circumstances in reference to time, place, manner, and

Fremont, etc., R. Co. v. Hagblad

condition that the railroad company must be deemed to have accepted him as a passenger." The rule stated in this case has been approved and cited many times since its announcement, both by text-writers and by courts, and we believe the doctrine stated to be sound. If the plaintiff has not brought himself within this rule, he was not a passenger, and never became such in the eye of the law, and unless, by the allegations of his petition, he is within the class, his petition will not state a cause of action. It will be observed that the petition contains no allegation in regard to the time when the train upon which he was intending to take passage was due to depart from Norfolk. It alleges the purchase of a ticket, but that alone does not make a person a passenger.

In *Illinois Central R. Co. v. O'Keefe*, 168 Ill. 115, 48 N. E. 294, 39 L. R. A. 150, 61 Am. St. Rep. 68, it is said: "One does not become a passenger until he has put himself in charge of the carrier, and has been expressly or impliedly received as such by the carrier. The purchase of a ticket does not make one a passenger, unless he comes under the charge of the carrier and is accepted for carriage by virtue of it." This case is reported in 61 Am. St. Rep. 68, with a monographic note upon the general subject of who are passengers and when they become such.

In *Illinois Central Ry. Co. v. Laloge*, 69 S. W. 795, 24 Ky. Law Rep. 693, 62 L. R. A. 405, the facts were that a passenger went to the railroad station five hours before his train was due, and was assaulted. A statute of Kentucky requires the ticket office and waiting room to be open, lighted, and warmed 30 minutes before train time. The court held that it was the duty of the carrier to provide such facilities for intending passengers within a reasonable time before the departure of its trains; that 30 minutes was a reasonable time, and that, by coming to the station 5 hours before the schedule time for the departure of the train, the plaintiff did not become a passenger; that there was no obligation upon the railroad to furnish accommodations for the entertainment for an indefinite length of time of those who contemplate in the future becoming its passengers; that there was no invitation, either express or implied, until within 30 minutes before train time; and that, consequently, it owed no duty to the plaintiff other or different from that owing to an ordinary person.

In *Phillips v. Southern Ry. Co.*, 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163, the circumstances were that a person went to the railroad station five hours before train time. The carrier had a rule to close its waiting room until 30 minutes before the time of departure of each train. The night was cold, the plaintiff was ejected, and was injured by the contraction of a severe cold and subsequent illness. In the opinion the court says: "A party coming to the railroad station with the intention of taking the defendant's next

train becomes, in contemplation of law, a passenger on defendant's road, provided that his coming is within a reasonable time before the time for departure of said train. To constitute him such passenger, it is not necessary that he should have purchased his ticket, as seems to have been considered by his honor. 1 Fetter, Carr. Pass. § 288. But the purchase of the ticket would probably be considered the highest evidence of his intention. But still it is his coming to the station within a reasonable time before, with the intention to take the next train, that creates the relation of passenger and carrier."

Another instructive case is *L. & N. R. Co. v. Reynolds* (Ky.) 71 S. W. 516, decided in 1903. The plaintiff had gone to the station to take a train at 11 p. m. His train was late, though he testified he did not know this. While he was standing on the platform, about 15 feet from the track, he was struck by a piece of coal which fell from a train which was passing rapidly by with loaded coal cars, and was severely injured. The court said: "Appellee was rightfully on the platform and sustained the relation of passenger to appellant, for he was there to take the train, and, the waiting room being closed, had a right to be on the platform. It was train time, and so he had a right to come to the station at this time to take the train; and if it be true that he was told the train was late, being at the station, he had a right to remain there and wait for it." With these views we concur.

A railroad company is not bound to furnish a place of entertainment for persons who may intend at some future time to become passengers over its road; and such a person who resorts to its station, or who stands upon its platform exposing himself to such dangers and risks as may naturally and obviously occur at such a place by reason of rapidly moving trains, switching of freight cars, or engines passing by, or by the moving of articles of freight, assumes and takes upon himself the risk of injury, and is entitled to the carrier's protection in no greater degree than any other licensee. Ordinary care under all the circumstances of the time and place is all he is entitled to. The fact that he may have procured a ticket is immaterial.

The relation of carrier and passenger does not begin until within a reasonable time prior to the time fixed for the departure of the train the prospective passenger intends to take, and not until he has in some manner, either expressly or impliedly, placed himself within the carrier's charge. If, within a reasonable time before the departure of the train he intends to take he goes to the place provided for the reception of intending passengers, and there places himself actually or impliedly within the carrier's care, then, and not until then, the law places around him the protection vouchsafed to passengers, and charges the carrier with the highest degree of care for his safety. To hold otherwise would be to

place a most unjust and onerous burden upon the carrier. In this day and age of "limited trains," "lightning expresses," "flyers," "cannon balls," as they are sometimes fancifully designated, many stations and platforms upon main lines of railroad are passed by such trains at rates of speed as high as 60 miles an hour. If a railroad company were held to the same high degree of care to persons who are not passengers over its road, resorting to its stations to loaf or loiter, it would be compelled to moderate the rate of speed of such trains at every way station along its line, and otherwise would be compelled to interfere with the operation of its trains, and the proper conduct of its business, to preserve the safety and welfare of persons to whom it owed no duty. Such a rule would be intolerable, and has not been enacted by the section under consideration. In order to state a cause of action upon the statutory duty of a railroad company to a passenger, it is necessary that the facts stated show that the person suing is one of a class of persons to whom the remedy is afforded by the statute. To plead that he is a passenger, in a case where the existence of such relation to the carrier is at issue, pleads a mere conclusion of law, and is not sufficient. This rule has been well stated in the case of *Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 337, where the plaintiff sued in trespass for removal from a railroad station house, and in his replication attempted to establish his right to be and remain at the station. The court sustained a demurrer to the replication, and entered judgment for the defendant. In the syllabus the court says: "The right to enter and remain at a railroad station house extends only as far as is reasonably necessary to secure to the traveler the full and perfect exercise and enjoyment of his right to be carried upon the cars, and, as to what is a reasonable time, will depend upon the circumstances of each particular case." And in the opinion it is said: "It is not alleged that it was the intent of the plaintiff to go upon the then next regular train, or that his ticket was for such train. For aught that is alleged, his ticket may have been for, and his intent to go upon, one of those trains called 'excursion trains' that are advertised to run at some particular time, and for which tickets are sold many days in advance of the time of departure. In this respect we think the replication is defective. The plaintiff should have alleged that at the time he was at the station awaiting the departure of a train that was expected soon to leave and on which he intended to go. The replication should show that the plaintiff was there intending to go upon a train that was expected to leave within such a short period of time thereafter that, in view of the rule as before laid down, he would have the right to remain at the station until its departure. This replication, we think, does not show such a state of facts as are necessary to vest such right in the plaintiff, and therefore it is insufficient." So far,

Tozier v. Haverhill & A. St. Ry. Co

then, from having brought himself within the class of "a passenger being transported," as the statute prescribes, plaintiff in this case has not even pleaded facts sufficient to show that he was a passenger under the nonstatute law prescribing the qualifications of the class of persons embraced under that general designation. For these reasons, we are of the opinion that the petition does not state a cause of action under the statute, and that the demurrer and objections to the introduction of evidence should have been sustained.

A bill of exceptions was settled and allowed in the case, but, since the sole question presented is the sufficiency of the petition, we have not examined the same.

We recommend that the judgment of the district court be reversed, and the cause remanded for further proceedings.

AMES and OLDHAM, CC. concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause is remanded for further proceedings.

TOZIER v. HAVERHILL & A. ST. RY. CO. (two cases.)

(Supreme Judicial Court of Massachusetts, Essex, Jan. 5, 1905.)

[72 N. E. Rep. 953.]

Injury to Passenger—Negligence of Motorman—Effect of Emergency.

In an action for injuries to a passenger in determining whether the motorman of the car acted with reasonable care in a sudden emergency, the fact that he was obliged to act quickly, and without a chance for deliberation, was to be considered.

Same—Same—Same—Instruction.

In an action for injuries to a passenger defendant requested an instruction that, if the motorman did not exercise the best judgment which he could have exercised, he being called on to act in an emergency, his error would not be such negligence as would make defendant liable: *held* properly refused, since the language was applicable to an error which might have been very gross, and inconsistent with proper care.

Marriage—Validity—Construction of Statute.

Pub. St. 1882, c. 145, § 4, declares that all marriages contracted while either party has a former spouse living, save as provided in chapter 146, shall be void, and by chapter 146, § 22 (Rev. Laws, c. 152, § 21), the party against whom a divorce is granted shall not marry within two years from entry of the final decree. St. 1895, p. 476, c. 472 (Rev. Laws, c. 151, § 6), makes marriages which were illegal because of one of the parties having another spouse living valid, after the impediment has been removed by the death or divorce of the other party to the former marriage, provided the contract was made by one of the parties in good faith in the belief that the former spouse was dead, or that there had been a divorce, or without knowledge of such former marriage: *held*, that where a woman was divorced by her husband, and within two years married again, and while chapter 145 was in force, the marriage was invalid, in the absence of any evidence bringing the contract within the statute of 1895.

Injuries to Wife—Action of Husband—Validity of Marriage.

In an action by a husband for injuries to his wife the marriage was

Tozier v. Haverhill & A. St. Ry. Co

to be proved as a fact, and it was error to treat it as collateral, and instruct the jury that they were to consider plaintiff as the de facto husband of the woman.

Exceptions from Superior Court, Essex County; John H. Hardy, Judge.

Action by Holcy M. Tozier against the Haverhill & Amesbury Street Railway Company, and action by Jeanette F. Tozier against the same defendant. Judgments in favor of plaintiffs, and defendant brings exceptions. In the first case sustained, and in the second overruled.

Timo. W. & Danl. H. Coakley and Chas. C. Johnson, for plaintiffs.

Chas. W. Bartlett and Elbridge R. Anderson, for defendant.

KNOWLTON, C. J. These are two actions brought by the plaintiffs, respectively—one to recover for injuries to the female plaintiff from the alleged negligence of the defendant in running a car in which she was a passenger; and the other to recover damages suffered by the male plaintiff, as her husband, resulting from her injury. It was conceded that she was in the exercise of due care, and the only exception now relied on in her case is to the refusal of the judge to give the jury this instruction, which the defendant requested: "If the jury find that the motorman did not exercise the best judgment which the case discloses could have been exercised, he being called upon to act in a sudden emergency, his error would not be such negligence as would make the defendant liable." If the request contained nothing but a statement of the familiar principle that, in determining whether one acts with reasonable care in a sudden emergency, the fact that he is obliged to act quickly and without an opportunity for deliberation is to be taken into account, and he is not to be deemed careless merely because he failed to do that which would have been best as shown by subsequent events, it properly might have been given. See *Ingalls v. Bills*, 9 Metc. 1, 43 Am. Dec. 346; *Cody v. New York & New England Railroad Co.*, 151 Mass. 462, 468, 469, 24 N. E. 402, 7 L. R. A. 843; *Gannon v. New York, New Haven & Hartford Railroad Co.*, 173 Mass. 40, 52 N. E. 1075, 43 L. R. A. 833. But it went further, and included the proposition that the motorman's error in not exercising the best judgment in a sudden emergency, if the jury found such an error, would not be actionable negligence, whatever the error might be in other particulars. The descriptive language in the request was applicable to an error which might have been very gross, and entirely inconsistent with the exercise of due care, as well as to an error which might have been excusable. We are of opinion that the instruction was properly refused, and that the exception in this case should be overruled.

The question in the other case grows out of the fact that at the time of the marriage of the two plaintiffs the female

plaintiff had a former husband living, who had obtained from her a divorce for desertion, which had been made absolute less than two years before. It is declared by Pub. St. 1882, c. 145, § 4, which was in force at the time of the marriage, that "all marriages contracted while either of the parties has a former wife or husband living, except as provided in chapter one hundred and forty-six, shall be void." In Pub. St. 1882, c. 146, § 22 (Rev. Laws, c. 152, § 21), there is a provision in reference to divorce persons "that the party against whom the divorce was granted shall not marry within two years from the time of the entry of the final decree of divorce." The record was put in evidence, and from the facts stated we infer that the divorce was granted in Massachusetts, where the parties lived. The ceremony of marriage of the present plaintiffs was performed in Haverhill. It is plain, therefore, that the marriage was invalid. *Googins v. Googins*, 152 Mass. 533, 25 N. E. 833; *Cook v. Cook*, 144 Mass. 163, 10 N. E. 749.

The plaintiff invokes Rev. Laws, c. 151, § 6, first enacted in St. 1895, p. 476, c. 427, which makes certain illegal marriages valid after the impediment to the marriage has been removed by the death or divorce of the other party to the former marriage, provided the marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, or that the former marriage had been annulled by a divorce, or without knowledge of such former marriage, and provided they continue to live together in good faith on the part of one of them. See *Lufkin v. Lufkin*, 182 Mass. 476, 65 N. E. 840; *Com., v. Josselyn*, 186 Mass. 186, 71 N. E. 313. But there was no evidence at the trial tending to show that either of the parties entered into the marriage contract under such circumstances as to bring the case within this statute. The evidence tended to show the contrary. Much less could it be said as matter of law that the case was covered by this statute.

The question as to the validity of the marriage was treated by the judge as collateral, and the jury were instructed that they were to consider the male plaintiff as de facto and legally the husband of the other plaintiff. We are of opinion that this was erroneous. The right of action depended upon the alleged fact that he was the husband of the female plaintiff, and this fact was to be proved like any other fact in the case.

In the case of *Holcy M. Tozier* the exceptions are sustained, and in the case of *Jeanette F. Tozier* the exceptions are overruled.

So ordered.

CHESAPEAKE & O. RY. CO. v. SMITH.

(Supreme Court of Appeals of Virginia, Jan. 12, 1905.)

[49 S. E. Rep. 487.]

Jurors—Bias.

Where members of a jury on their voir dire stated that they were friends of the plaintiff, and that he was their family physician, but that such relation would have no influence on their verdict, they were not disqualified on the ground of implied bias.

Injury to Alighting Passenger—Negligence—Unguarded Cattleguard.*

Plaintiff returned to his home at night. As the train approached plaintiff's station, the brakeman opened the door of the rear car, in which plaintiff was riding, and called the station, and plaintiff and the other passengers got off on the ground, not knowing that they were 80 yards from the depot. The night was dark, and plaintiff, after the train left, in walking along the unlighted track toward the depot, fell into an unguarded cattle guard, and was injured: *held*, that the railway company was guilty of negligence.

Same—Contributory Negligence—Ways to Station.

Plaintiff was not guilty of contributory negligence in not going through the cars between him and the station platform before getting off, or in not finding the conductor, who was at the front end of the train, and requesting him to move the train until the rear car reached the platform.

Appeal from Circuit Court, Fluvanna County.

Action by O. M. Smith against the Chesapeake & Ohio Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

BUCHANAN, J. O. M. Smith instituted this action against the Chesapeake & Ohio Railway Company to recover damages for injuries received by him, resulting from the alleged negligence of the railway company.

Upon the trial of the cause there was a judgment in his favor, and to that judgment this writ of error was awarded.

The first error assigned in the petition is to the action of the circuit court in overruling the demurrer to the declaration, and to each count thereof. This assignment of error was abandoned in the oral argument, and properly so, as each count sets out a good cause of action.

The second assignment of error is to the refusal of the court to sustain the railway company's objection to certain members of the jury who were sworn to try the case. The objection made to these jurors is that, they were friends of the plaintiff, and that he was their family physician.

The bill of exceptions shows that when examined on their voir dire they "stated that they were friends of the plaintiff, and that he was their family physician, but that such relation to the plaintiff would have no influence upon their verdict." A juror is not disqualified from sitting in a case because he is

*As to the care due alighting passengers, see foot-note appended to *Ellis v. Chicago, etc., Ry. Co. (Wis.)*, 12 R. R. R. 122, 35 Am. & Eng. R. Cas., N. S., 122.

a friend of one of the litigants (*Reg. v. Geach*, 38 E. C. L. 195), nor where there is great intimacy between their families, unless it appears that such relations will interfere with his impartiality of action (*Montague's Case*, 10 Grat. 767, 774).

There are certain relations in life from which the law conclusively presumes bias, such as affinity or consanguinity within certain degrees; and when a juror is examined upon his *voir dire*, and it appears that such relationship exists, that alone is sufficient to exclude him from the jury, although in fact he may be free from all bias. There are other relations existing between juror and litigant from which the law raises no presumption of bias, yet, if upon his examination it appears that the juror is not impartial, the law excludes him. In such a case the trial court must determine the juror's competency from all the facts before it. The juror may state and honestly believe that he is free from all bias, and yet it may appear from his own or from extraneous evidence, or both, that such may not be the fact. The object of the law in all cases is to obtain an intelligent as well as impartial jury. In order to do this, it is neither necessary nor wise to determine the juror's impartiality by extending and applying arbitrary or technical presumptions which may have the effect of excluding the most competent man on the list from the jury. Sustaining challenges for favor on slight grounds, as was said by the General Court in *Moran's Case*, 9 Leigh, 651, 656, tends to place the administration of justice in the hands of the most ignorant and least discriminating portion of the community, by which the safety of the accused may be endangered, and the proper administration of the laws put to hazard; and we are therefore not disposed to enlarge the grounds of challenge beyond those properly deducible from the cases heretofore decided. We have been cited to no case, nor have we found one in our investigation, which holds that, where the relation of physician and patron exists, the law conclusively presumes such bias that neither is competent to act as juror in a case to which the other is a party. The contrary has been held in the case of attorney and client (*Reg. v. Geach*, *supra*), who in many respects occupy similar relations. The examination of the jurors in question—and that was the only evidence before the court—could leave no doubt in the mind of the court as to their competency, and it did not err in accepting them as jurors.

The third assignment of error is to the action of the court in overruling the railway company's demurrer to the evidence.

The facts, as they appear upon the demurrer to the evidence, are substantially as follows: The plaintiff, with his wife, mother, and sister, had on the morning of the accident gone from Columbia, a station on the railway company's line, to Richmond, on an excursion train, consisting of 12 coaches, carrying about 1,000 passengers. The train returned

that evening, reaching Columbia behind time and after dark. As the train approached the station, and immediately before it stopped, a brakeman opened the front door of the rear car, in which the plaintiff was riding, called out "Columbia," and passed into the car ahead. As soon as the train stopped, all passengers on that car got off on the side next to the canal. The plaintiff, with his party, alighted with some difficulty, on account of the height of the car steps from the ground, and the bundles they were carrying. They waited until the train pulled out, which was about four minutes from the time it stopped. After the train left, the plaintiff and his party went upon the railway track and started towards the depot, which was some 80 yards distant. Between him and the depot, after getting off the train, about 20 or 25 yards off, and unknown to him, there was a cattle guard, 4 feet deep, into which the plaintiff, who was in advance of his party, fell, and suffered the injury complained of. The night was very dark—so dark that the plaintiff and the ladies who were with him could not see each other after the train left; and he saw no light until after he had fallen and was getting out of the cattle guard, when he saw two men, with lanterns, about 50 yards away between him and the depot. When the plaintiff got off the car, he did not know exactly where it was. None of the railway employees aided him or his party in getting off the car, nor furnished light, nor gave him any information as to the cattle guard, which he would be compelled to pass in going from where he alighted to the depot.

When the train stopped, the plaintiff did not know how far his car was from the station platform, but thought that it was his duty to get off as he did. Upon cross-examination he stated that he knew that, if he had asked the conductor to pull up to the station, he would have been obliged to do so; and the conductor testified that, if requested, he would have done so, but stated that it was his duty to be at the platform when passengers were getting off the train, and that he was standing there, assisting them in getting off. The plaintiff testified that the car ahead of his was crowded, and that he and his party could not have gotten through the crowded cars (some six in number) to the platform before the train pulled out. The station platform was sufficiently long to enable passengers to get on and off the trains of the length usually run upon the road.

It is the duty of a railway company, for the protection of passengers carried or to be carried on its trains, to provide and maintain at its stations reasonably safe and adequate ways for approaching and leaving its trains, and at night to have such ways reasonably lighted a sufficient time before and after the arrival and departure of each train to enable passengers to avoid danger. See 6 Cyc. L. & P. 605-610; *Alex. & Fred. R. Co. v. Herndon*, 87 Va. 193, 199, 200, 12 S.

Chesapeake & O. Ry. Co. v. Smith

E. 289; *Richmond & Dan v. R. Co. v. Morris*, 31 Grat. 200; *Reed v. Axtell, etc.*, 84 Va. 231, 4 S. E. 587.

And where passengers are invited, expressly or impliedly, to get off a train at a place other than that at which they usually alight, and there is any special danger attending their approach to the station, it is the duty of the railway company to warn them of such danger, and to aid them in reaching the station in safety; and especially is this true in the nighttime. See same authorities cited above.

The action of the railway company in announcing the approach of its train to the plaintiff's station, in leaving his car door open, and in stopping the train, was clearly an invitation to the plaintiff to alight. It was so understood by him and all the other passengers on that car, as appears from their action in getting off. It was so intended by the railway company, since it gave no other opportunity for them to get off. It knew that passengers, getting off the car in which the plaintiff was, could not reach the station without passing over the cattle guard. Yet it neither warned the plaintiff of this danger, nor lighted up the way, nor gave him any assistance whatever in reaching the station, but moved its train off, leaving him and his party to grope their way to the station in darkness so great that they could not see each other.

It is not often (and to the credit of the railways of the state) that we are called upon to consider a case of such culpable negligence on the part of a railway company to its passengers as this record discloses. The railway company's negligence was clearly the proximate cause of the plaintiff's injury. It knew that, in reaching the station from where it had invited him to leave its train, he would have to pass over the cattle guard. His falling into it, under the circumstances disclosed by the record, was one of the probable injurious consequences which were to be anticipated from its negligence; and that fact, and not the number of subsequent events or agencies which intervened, is the legal as well as the pactical and common-sense test of whether or not its negligence was the proximate cause of the plaintiff's injury. *Standard Oil Co. v. Wakefield, etc.*, 102 Va. 824, 832-834, 47 S. E. 830, and authorities cited.

The contention that the plaintiff was guilty of contributory negligence in not going through the cars between him and the station platform before getting off, or in not hunting up the conductor, who was at the front end of the train, and requesting him to move the train until the rear car reached the platform, so that the passengers in it could get off in safety, is without merit. The plaintiff, as we have seen, was invited to get off where he did; and he cannot be held guilty of negligence for doing what he was asked to do, or for failing to do what is not usual, and what ordinary prudence would not have suggested, and what, if it was necessary or proper for

Bank of Irwin v. American Express Co

him to do for his safety, the railway company ought to have informed him of when it announced his station and stopped its train.

The judgment of the circuit court is, in our opinion, plainly right, and must be affirmed.

CARDWELL, J., absent.

BANK OF IRWIN v. AMERICAN EXPRESS CO.

(Supreme Court of Iowa, Jan. 12, 1905.)

[102 N. W. Rep. 107.]

Freight—Ownership of Consignee—Presumption.

It is presumed that on the delivery of goods to a carrier the title thereto passes to the consignee, and such presumption is sufficient to sustain an action by the consignee as owner either in tort or for a breach of contract.

Nondelivery of Money by Carrier—Contents of Package—Carriers Receipt—Instructions.

In an action by the consignee against a carrier for nondelivery of money, where the carrier's receipt was offered in evidence merely to show that the package supposed to contain the money was delivered to it, and the court charged that plaintiff could not recover unless it was shown that the package contained money when it was delivered to the carrier, a further charge that the receipt was only prima facie evidence of the receipt of the money, and it was competent for defendant to show that the package did not in fact contain any money at the time it was delivered to it, was properly refused.

Same—Evidence—Admissions of Consignee.

The admissions of the consignor are not binding on the consignee in an action by the latter against the carrier for nondelivery.

Same—Seal on Package Tampered with While Left with Consignor—Rights of Consignee—Presumptions.

Where the carrier undertook an investigation of a loss of money, and the package supposed to have contained the money was left, pending investigation, with the consignor, the fact that a wax seal on the envelope was tampered with while in the possession of the consignor raised no unfavorable presumption against the consignee, in the absence of anything to connect it with the alteration.

Same—Evidence—Character of Employees.*

In an action against an express company for a failure to deliver money consigned to it, evidence of the good moral character of its employees was inadmissible.

Same—Evidence.

In an action by the consignee against an express company for its failure to deliver money, evidence that several months before the transaction in question the consignor had been losing money through the theft of some of its employees was incompetent.

Same—Same.

A bank delivered money to an express company for shipment. When the package arrived at its destination, the consignee, on opening it, found nothing therein but waste paper. In an action by the consignee

*As to the admissibility of evidence of habits or reputation as bearing on question of negligence or contributory negligence, see foot-note appended to *Illinois Cent. R. Co. v. Prickett* (Ill.), 13 R. R. R. 139, 26 Am. & Eng. R. Cas., N. S., 139, where all preceding authorities in this series are collected.

Bank of Irwin v. American Express Co

against the carrier for nondelivery, the carrier's contention was that the money was never delivered to it. To support this contention it was shown that pieces of paper found in the package when it was delivered to plaintiff disclosed certain stains. The color of the panels of the counter in the bank was then shown. The stains on the paper were tobacco stains: *held*, that an objection to a question as to whether the color of the bank panels was similar to the color of the stains on the paper was properly sustained.

Same—Sufficiency of Evidence.

In an action against a carrier for nondelivery of money, evidence of the delivery of the money to the carrier, and that when the package supposed to contain it was delivered to the consignee it contained nothing but waste paper, was sufficient to support a verdict for plaintiff.

Appeal from District Court, Shelby County; W. R. Green, Judge.

Suit at law to recover the value of a package of money alleged to have been delivered to the defendant at Des Moines, Iowa, for transportation to Irwin, Iowa. The main defense of the express company was that the money was not delivered to it for carriage. There was a trial to a jury, and a verdict and judgment for the plaintiff. The defendant appeals. Affirmed.

Lyon & Lyon, for appellant.

Byers, Lockwood & Byers, for appellee.

SHERWIN, C. J. The plaintiff, by letter, requested the Des Moines National Bank to transmit to it by express \$2,000 in currency. The evidence tends to prove that the paying teller of the latter bank placed that amount of money in bills of small denomination in an express company envelope, which was afterwards sealed and delivered to the appellant for carriage to the plaintiff at Irwin, Iowa, and that when the package was delivered to the plaintiff it contained nothing but waste paper.

The contention that the plaintiff has not shown itself entitled to maintain this action is without merit. It is admitted that it was the consignee of the package, and the presumption is that the title thereto passed to it upon the delivery thereof to the appellant, and such presumption is sufficient to sustain an action by the consignee as owner, either in tort or for a breach of contract; and there is nothing in the record which tended to rebut the presumption. *Robinson Bros. & Gifford v. The M. D. T. Co.*, 45 Iowa, 471; 6 Cyc. 511, and cases cited.

The receipt given for the package by the appellant's agent in Des Moines was in evidence, and the appellant asked an instruction to the effect that it was only prima facie evidence of the receipt of the money, and that it was competent for the defendant to show that the package did not in fact contain any money at the time it was delivered to it. There was no error in refusing the request.

Bank of Irwin v. American Express Co

The court instructed that the plaintiff could not recover unless it was shown by a preponderance of the evidence that the package contained \$2,000 when it was delivered to the appellant in Des Moines. This instruction was more favorable to the appellant than the one asked, and the receipt was offered for the purpose only of showing that the package was delivered to the appellant.

The admissions of the president of the Des Moines bank could in no way bind the plaintiff, and were properly rejected.

The package which was delivered to the plaintiff at Irwin was soon thereafter taken by the appellant's agents for an investigation of the loss, and while under its control it was left for a short time with the officers of the Des Moines National Bank. It was claimed on the trial that one of the wax seals on the envelope was tampered with while it was so in the possession of that bank, and the appellant asked an instruction which sought to charge the plaintiff with an unfavorable presumption on account thereof. The instruction was rightly refused. There was nothing in the evidence warranting an inference, even, that the plaintiff was in any way connected with such alteration, if it was in fact made.

All of the instructions are assailed, and we cannot notice each separately. A careful examination of them shows that they were full and fair and without error. During its transmission from Des Moines to Irwin the package was in the possession of many of the appellant's employees, and evidence was offered to prove the good moral character of such employees. We know of no rule justifying its admission in this case. The appellant offered to prove that several months before the transaction in question the Des Moines National Bank had been losing money through the theft of some one of its employees. This testimony was clearly incompetent, and we are cited to no authority holding otherwise. The only theory on which such testimony could possibly be competent in this case would be that the stealings from the bank were a part of the same transaction as the shipment of the money, and the questions asked and the offer made negative any pretense of this kind. 1 Elliott on Evidence, §§ 152-157, inclusive. In *Cunard S. S. Co. v. Kelley*, 115 Fed. 678, 53 C. C. A. 310, relied upon by the appellant, the holding that it was competent to prove that there had been a substitution of goods shipped on another steamship was expressly put on the finding that the two shipments grew out of and were in fact a part of the same transaction; and we think the case goes to the limit. Some of the pieces of paper found in the envelope when it was delivered to the plaintiff were stained.

They were exhibited to a witness on the trial, and he was permitted to testify to the color of the panels of the counter in the Des Moines bank, and was then asked if their color

Redmon v. Metropolitan St. Ry. Co

was similar to the color of the stain on the paper. An objection to the question was properly sustained. In the first place, the witness said that the stain was a tobacco stain, and that the counter was varnished; in the second place, the jury could make the comparison as well as the witness; and, furthermore, there was nothing to indicate that the bank counter had been stained or varnished within 20 years.

Complaint is made of other unimportant rulings on the introduction of testimony, but we find no error therein. The court was manifestly right in refusing to take the case from the jury. While there are many circumstances tending to support the contention of the appellant that the money was not delivered to it, and tending to support the testimony of the several agents of the defendant through whose hands the package passed en route to Irwin that it was not taken by them, the evidence tending to prove that the money was in the envelope when it was delivered in Des Moines is of such character that it cannot be said as a matter of law that the verdict lacks support.

We have given the entire record careful consideration, and reach the conclusion that the judgment must be and it is affirmed.

REDMON *v.* METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri, Division No. 2, Dec. 13, 1904.)

[84 S. W. Rep. 26.]

Injury to Passenger—Excessive Verdict.

Where, in an action for injuries to a passenger, it appeared that three ribs were dislocated from their attachment to the bones of the back and knocked forward about an inch, that his heart and spine were affected, and that his bowels would not act without medicine, a verdict for \$3,000 was not excessive.

Street Railways—Passengers—Degree of Care.*

Street car companies are carriers of passengers, and held to the highest care and skill, in preventing injuries to passengers, which prudent men would exercise under like circumstances.

Injury to Passengers—Prima Facie Case—Sudden Stop.†

In an action by a passenger on a street car for injuries, a showing that the car came to a sudden stop, whereby he was thrown from his seat, made out a prima facie case in his favor.

*As to the degree of care required of a carrier of passengers, see foot-note appended to *Johnson v. Seattle Elec. Co.* (Wash.), 12 R. R. R. 786, 35 Am. & Eng. R. Cas., N. S., 786; foot-notes appended to *Logan v. Metropolitan St. Ry. Co.* (Mo.), 12 R. R. R. 753, 35 Am. & Eng. R. Cas., N. S., 753; foot-notes appended to *Fitch v. Mason City & C. L. Traction Co.* (Iowa), 12 R. R. R. 451, 35 Am. & Eng. R. Cas., N. S., 451; foot-note appended to *Howell v. Lansing City Elec. Ry. Co.* (Mich.), 12 R. R. R. 61, 35 Am. & Eng. R. Cas., N. S., 61.

†As to the presumption of negligence from fact of injury to passenger, see foot-note appended to *Allen v. Northern Pac. Ry. Co.* (Wash.), 12 R. R. R. 838, 35 Am. & Eng. R. Cas., N. S., 838; foot-notes appended to *Logan v. Metropolitan St. Ry. Co.* (Mo.), 12 R. R. R. 753, 35 Am. & Eng. R. Cas., N. S., 753; foot-notes appended to *Feldschneider*

Redmon v. Metropolitan St. Ry. Co**Same—Res Gestæ—Statements of Conductor.‡**

Where a street car came to a sudden stop, and a passenger was thrown from his seat and injured, and when he regained consciousness, while the conductor was removing him from the car, he inquired of the conductor the cause of the trouble, the statement of the conductor as to what had caused it was not admissible as *res gestæ* in an action for the injuries.

Same—Declarations of Agent.‡

The statement was not admissible as the declaration of an agent binding on his principal.

Same—Evidence—Prejudicial Error.

The erroneous admission of the statement of the conductor that a coupling pin had fallen into the slot rail was prejudicial to defendant.

Same—Sudden Stop—Obstruction—Burden of Proof.

Where the sudden stopping of a street car caused a passenger to be thrown from his seat and injured, and, in an action by him for the injury, the cause of the same was alleged to be the violent stopping of the car, and there was evidence that a bolt or piece of iron of some kind was taken out of the slot rail after the accident by defendant's servants and taken away by them, the character of such piece of iron being within the knowledge of defendant, the burden was on defendant, to show how the obstruction, whatever it was, got into the rail.

Same—Same—Negligence—Instructions.

Where, in an action for injuries to a passenger on a street car, the cause of the injury was alleged to be the sudden, violent stopping of the car, and there was some evidence that after the accident a bolt or piece of iron of some kind was taken from the slot rail, it was proper not to restrict the jury to finding negligence as to the presence of a bolt or piece of iron in the rail.

Medical Testimony.

In an action for injuries it is proper to permit an expert medical witness to give his opinion on a hypothetical question that a certain injury was the cause of a disease or condition found in the injured person.

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by J. G. V. Redmon against the Metropolitan Street Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Jno. H. Lucas, for appellant.

Neal & Epstein, for respondent.

GANTT, P. J. This is an action for damages alleged to have been caused to the plaintiff by the negligence of the defendant. On the afternoon of October 8, 1900, the plaintiff, while a passenger on a cable car of defendant, was injured by the sudden and violent stoppage of the car near the intersection of Ninth street by Walnut street.

v. Chicago, etc., Ry. Co. (Wis.), 12 R. R. R. 737, 35 Am. & Eng. R. Cas., N. S., 737; foot-notes appended to *Fitch v. Mason City & C. L. Traction Co. (Iowa)*, 12 R. R. R. 451, 35 Am. & Eng. R. Cas., N. S., 451; foot-note appended to *Thurston v. Detroit United Ry. Co. (Mich.)*, 12 R. R. R. 434, 35 Am. & Eng. R. Cas., N. S., 434; foot-notes appended to *Cronk v. Wabash R. Co. (Iowa)*, 12 R. R. R. 429, 35 Am. & Eng. R. Cas., N. S., 429.

‡Declarations of railroad employees as *res gestæ*, see foot-note appended to *Nelson v. Georgia, C. & N. Ry. (S. Car.)*, 13 R. R. R. 150, 36 Am. & Eng. R. Cas., N. S., 150.

The petition alleges the incorporation of the defendant, and its ownership of a street railway over and along Ninth street; that as such street railway company it was a common carrier of passengers for hire, charged with all the duties and liabilities of such common carrier; that at all the times complained of, and prior thereto, the cars and trains of defendant were propelled and operated by means of an endless or continuous cable or wire rope, which was caused to move by machinery driven by steam power, and which cable was grasped by a device attached to its cars called a "grip," which caused the cars to move with said cable or wire rope, which grip was operated by the servants or agents of defendant, who caused said grip to grasp and release said cable at the bill of the operator; that defendant usually ran its cars in trains of two cars each, and the injury of which plaintiff complains was done while plaintiff was occupying the rear car of a train of two cars, as hereinbefore shown; that on October 8, 1900, he entered the rear car of said train of defendant at a point west of Walnut street, on Ninth street, for the purpose of going east to its termination; that plaintiff complied with all the requirements of defendant, and became a passenger on said car of defendant, and as such occupied a seat in said car; that while lawfully occupying said seat as such passenger as aforesaid, and entitled to all the rights, privileges, care, and protection which defendant owed to its passengers, and while plaintiff was in the exercise of due care, when said cars reached Walnut street, and while making a high rate of speed, the said cars, by reason of the carelessness and negligence of the defendant, its agents and servants, came to an instant, abrupt, unusual, and sudden stop, whereby plaintiff was thrown with great violence from his seat in said car against the stove, seats, sides, and floor of the said car, by which he received and sustained great bodily injuries, to wit, three of his ribs were broken, and he suffered internal injuries in his intestines and bodily organs, and his heart and liver were deranged and enfeebled, and his bowels partially paralyzed, and he was permanently injured, etc., for which he prayed damages in the sum of \$30,000. The answer admitted the incorporation of defendant, and denied all other allegations in the petition, and also pleaded contributory negligence. The cause was tried, and a verdict of \$3,000 rendered in favor of plaintiff, and judgment accordingly. After motions for a new trial and in arrest of judgment had been filed and overruled, the defendant appealed to this court.

The facts developed on the trial are substantially these: The plaintiff is about 40 years old. About 3 o'clock in the afternoon of the 8th of October, 1900, he took a seat in one of defendant's street cars on Ninth street, intending to go to his home in Independence, Mo. He got on the car at what is known locally as "the junction" of Ninth and Main streets. His car was going east. The next street east is Walnut

Redmon v. Metropolitan St. Ry. Co

street. As he was in the act of paying his fare, the train of two cars came to an abrupt and sudden stop. The plaintiff was shocked and rendered insensible at first, but recovered consciousness while the conductor and some one else were removing him from the car. The plaintiff inquired of the conductor the cause of the trouble, and was told that a coupling pin had fallen from the car into the slot rail. This evidence was objected to at the time, but admitted by the court.

Peter Martin, an employee of defendant at the time, and who had worked for the defendant 13 years, testified he was a flagman at the Walnut and Ninth street crossing, for defendant, on the day of the injury to plaintiff, and remembered the accident. He had been on duty at the crossing of Walnut street by the Ninth street cars of defendant up to 3 o'clock that day, when another flagman took his place. He was standing on the north side of Ninth street and on the west side of Walnut street, waiting for a car to go to Westport or to Fifteenth and Grand avenue. Had been there only a short time. The accident happened while he stood there. The Ninth street car came up the incline on Ninth, and came to a sudden stop when it hit Walnut street. The car stuck there for a few minutes. The wrecking wagon soon came. Ben Lee was the driver, and George Hall, the rope splicer of defendant, was there, and the other flagman. John Evans was there also in a few minutes. The car had not reached clear up on Walnut street when it stopped. The grip car stopped on the first track on Walnut street. The train was composed of a grip car and one coach. The train stopped with a jar or shock. When the wrecking wagon came, the car was shoved west and the wreck cleaned up, and the train started again. The wreck caused a delay of 5 minutes, or possibly 10 minutes. He saw one man helped out and taken to the sidewalk. He had his hand on his forehead. He saw something taken out of the slot rail; couldn't say whether it was a bolt or a pin. "I saw them taking it out of the slot rail, and the men took whatever it was away. I think it was one of the railroad men that took it, but don't know which one it was. All the cars of the Ninth street line have drawheads in each end. The coupling pins were bolts about six inches long and seven-eighths of an inch in diameter, which held the links which connected the cars." On cross-examination he stated that the cars on Ninth street passed this crossing sometimes every 2 minutes, and sometimes it was 15 minutes between cars. The cars had been running regularly on the day of the accident, and there was no stoppage until the car on which plaintiff was riding suddenly stopped. No other car so stopped that day to his knowledge. There was something in the slot rail to stop the car. It was taken out so quick he didn't know what it was. He didn't take it out himself, but to the best of his recollection one of defendant's men took it out, but he didn't know which one of them it was.

Redmon v. Metropolitan St. Ry. Co

There was evidence that plaintiff's fourth, fifth, and sixth ribs on the right side were dislocated from their attachment to the bones of the back, and knocked forward something like an inch; that his heart and spine were affected; that his bowels would not act without medicine. The evidence as to the extent and permanency of his injuries was conflicting, and it suffices on this point to say that there is nothing in the verdict indicating that it was the result of prejudice or passion.

1. It is earnestly argued and urged by counsel for defendant that the demurrer to the evidence should have been sustained, and that the circuit court committed reversible error in not so doing. This contention must be settled by a review of the testimony in the light of the law governing defendant's liability as a carrier of passengers. It is the settled law of this state that street car companies are carriers of passengers, and held to the same degree of care and vigilance in preventing injuries to their passengers as is required of other railroads carrying passengers for hire; that is to say, the highest care and skill which prudent men would use and exercise in a like business and under like circumstances. *Jackson v. Ry. Co.*, 118 Mo. 199, 24 S. W. 192; *O'Conner v. Ry. Co.*, 106 Mo. 482, 17 S. W. 494; *Clark v. C. & A. Ry. Co.*, 127 Mo. 197, 29 S. W. 1013; *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799.

In the case last cited the rule announced in *Stokes v. Saltonstall*, 13 Pet. 181, was approved, to wit, that, "when damage or injury happens to a passenger by the breaking down or overturning of the coach, the presumption, *prima facie*, is that it occurred by the negligence of the coachman, and onus probandi is on the proprietors of the coach to establish that there has been no negligence whatever, and that the damage or injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent. For the law will, in tenderness to human life and limbs, hold the proprietors liable for the slightest negligence, and will compel them by satisfactory proofs to repel every imputation thereof."

In *Carpue v. London & Brighton Ry.*, 5 Ad. & El. (N. S.) 747, where the injury was caused by a train running off the track and overturning the carriage in which the plaintiff was a passenger, Denman, C. J., told the jury that, "it having been shown that the exclusive management of the machinery and the railway was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause." In this case the defendant was the owner of and in exclusive control of the track on which it propelled its cars; and plaintiff was a passenger in its cars, and while sitting in his seat he was injured by the sudden and abrupt stopping of the car. In a word, the injury arose from apparatus wholly and entirely

Redmon v. Metropolitan St. Ry. Co

under the control of defendant, and furnished and operated by it; and, such being the case, we think the plaintiff made out his *prima facie* case of negligence against the defendant, and the burden was cast upon defendant of showing that the accident was not the result of that want of care and vigilance which the law makes it obligatory on defendant to bestow. *Hipsley v. R. R.*, 88 Mo. 348.

In *Dougherty v. Railroad*, 81 Mo. 325, 51 Am. Rep. 239, it was said: "Without reviewing the authorities, the following proposition is clearly deducible: That, where the vehicle or conveyance is shown to be under the control or management of the carrier or his servants, and the accident is such as, under an ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

Now, it requires no argument or proof to establish that an accident such as this, in the ordinary course of things, would not happen if the owners and operators of street cars used proper care in the management of their cars and the maintenance and inspection of their tracks and slots and underground crossings, and the case, therefore, in the first instance, is one in which plaintiff was entitled to the presumption of negligence, or, in other words, had made out his *prima facie* case when he closed his evidence, independent of the statement of the conductor to him that the accident had been caused by a coupling pin falling into the slot rail, and accordingly no error was committed in overruling the demurrer to the evidence, either at the close of plaintiff's case or at the close of all the evidence.

2. It is, however, urged that manifest error was committed in admitting, over defendant's objection and exception, the statement of the conductor to the plaintiff after plaintiff had been hurt, in explanation of the cause of the sudden stop of the train. Plaintiff urges it was admissible on two grounds: First, because made by the conductor, the agent of the defendant in charge of the train, to an injured passenger who had the right to make the inquiry; second, because it was a part of the *res gestæ*. Considering the second proposition first, it may be said that the courts do not differ materially as to what the doctrine of *res gestæ* is, but they are hopelessly variant in its application. The *res gestæ* may be defined as those circumstances which are the automatic and undisguised incidents of a particular litigated act, and which are admissible when illustrative of such act; indeed, must be in contemplation of law, a part of the act itself. Narratives, unconnected with the principal facts, are universally rejected. Applying this general rule, a statement by a motorman after a child had been run over by his car, and while the car was still standing in the street, was rejected in *Ruschenberg v. Ry. Co.*, 161 Mo., loc. cit. 79, 80, 61 S. W. 626, following

Redmon v. Metropolitan St. Ry. Co

Barker v. Ry. Co., 126 Mo. 143, 28 S. W. 866, 26 L. R. A. 843, 47 Am. St. Rep. 646, and *Adams v. Ry. Co.*, 74 Mo. 553, 41 Am. Rep. 333. If those cases are to be followed—and we think they should be—the admission of the statement of the conductor cannot be sustained as a part of the *res gestæ*. On its face it is a narrative of what had happened, and the cause thereof, and elicited by a question as to the cause of the trouble. Was it admissible on the ground that the conductor was the agent and representative of the company, and made the statement by authority, and to a passenger who had the right to demand the cause of his injury? This must be solved by the application of the law of principal and agent. The admission or declaration of his agent binds the principal only when it is made, during the continuance of the agency, in regard to the transaction then depending. This must be regarded as settled law in this state. *Rogers v. McCune*, 19 Mo. 557; *McDermott v. Ry. Co.*, 73 Mo. 516, 39 Am. Rep. 526; *Adams v. Ry. Co.*, 74 Mo., loc. cit. 555, 556, 41 Am. Rep. 333; *Aldridge's Adm'r v. Furnace Co.*, 78 Mo., loc. cit. 559; *Devlin v. R. R.*, 87 Mo. 545; *Barker v. R. R.*, 126 Mo., loc. cit. 148, 28 S. W. 866, 26 L. R. A. 843, 47 Am. St. Rep. 646. Applying the rule just stated, the question arises in each case, were the statements of the agent contemporary with the transaction and illustrative of its character, or merely a subsequent narrative of how it occurred, or an explanation of how it might have been avoided? If the latter, they are inadmissible. Considered with reference to this particular case, it must be conceded that in point of time they came very quickly after the accident and wreck; but though thus soon after the collision, it seems to us to be apparent it was a recital of the cause of it, and no part of the transaction while passing, and the statement for this reason falls within the doctrine announced by Judge Scott in *Rogers v. McCune*, 19 Mo. 558, and uniformly adhered to by this court in subsequent decisions. *Koenig v. Ry. Co.* (Mo. Sup.) 73 S. W. 637. This admission of this evidence cannot be said to be harmless. Coming, as it did, from the conductor of the train, it was calculated to carry conviction that the cause of the accident was the falling of the coupling pin into the slot—a fact, if true, that tended to make a case of negligence as between a carrier and one of its passengers, in and of itself. We think the admission of this evidence was reversible error.

3. The contention that the instructions were too broad, and should have restricted the jury to finding negligence as to the presence of a pin or bolt in the slot rail, we think is not well taken. The cause of injury was alleged to be the sudden violent stopping of the car, and the resulting shock to plaintiff. The insistence that the cause of the stop was known, and therefore the burden was on plaintiff to show how the obstruction, whatever it was, got into the slot, and was not shifted to defendant, we think cannot be maintained. It was

not a conceded fact in the trial that a coupling pin had fallen into the slot, as plaintiff attempted to prove. This was strenuously controverted by defendant's witnesses. The plaintiff was a passenger. He was without fault. The sudden unusual stopping of the car shocked him, and caused whatever injury he suffered. The defendant was in the exclusive control and management of its trains, and of its track and underground appliances provided for the crossing of its tracks on Ninth street by its tracks on Walnut street. There was evidence that some kind of bolt or piece of iron was taken out of the slot, but whatever it was, it was taken away by defendant's own servants, and the character of it was peculiarly within the knowledge of the defendant, and the burden devolved upon it of showing how and why the sudden stop occurred. "Where the thing is shown to be under the management of the defendant or its servants, and the accident is such as in ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." *Scott v. London Dock Co.*, 5 Q. B. 411; *Clark v. C. & A. R. Co.*, 127 Mo. 197, 29 S. W. 1013; *Guffay v. Ry. Co.*, 53 Mo. App. 462. The burden was on defendant to show that the obstruction was in the slot without negligence on its part, and this it undertook to do by showing its inspection of the cars and tracks. Whether it did so to the satisfaction of the jury, was a matter for the jury under proper instructions. The peremptory instruction asked by defendant was properly refused. The other instructions given covered the issues in the case, and were fair and liberal to the defendant.

4. The only remaining point necessary to be determined at this time is the alleged error in the admission of the evidence of Dr. Hannawalt. The contention is that the jury were as competent as Dr. Hannawalt to pass on the question of whether plaintiff's injuries were the result of the shock received by him at the time of the accident. As said in *Wood v. Metropolitan Street Ry. Co.* (Mo. Sup.) 81 S. W. 152, loc. cit. 156, "There can be no doubt that it is not allowable to permit an expert witness to give his opinion upon the matters upon which men of common information are capable of forming a judgment." Many of the cases cited by appellant are clearly of this character, and do not reach the point now under consideration. As said by Macfarlane, J., in *Benjamin v. Ry. Co.*, 133 Mo. 288, 34 S. W. 593, "An exception is made to the general rule forbidding witnesses to give their opinions, and persons who, by experience, observation, or knowledge, are peculiarly qualified to draw conclusions from such facts, are, for the purpose of aiding the jury, permitted to give their opinions." We have so recently examined this question, and expressed our opinion, in *Wood v. Metropolitan Co.*, 81 S. W. 156, 157, 158, that an expert medical man, such

as Dr. Hannawalt was shown to be, was competent to give his opinion upon a hypothetical question that an injury was the cause of a disease or condition found in an injured person, that we must decline to do more than refer to that decision for an expression of our views on this point. On a retrial, the circuit court can require the hypothetical question to be so framed as to submit those facts of which there was evidence, and require the witness to give his opinion upon the facts thus stated, and, assuming that they were true, leaving it to the jury, of course, to find the truth or falsity of the assumption.

For the error in the admission of the statement of the conductor over the objection of defendant, the judgment must be, and is, reversed, and the cause remanded for a new trial.

FOX, J., concurs. BURGESS, J., absent.

SOUTH COVINGTON & C. ST. RY. CO. v. RIEGLER'S ADM'R.

(Court of Appeals of Kentucky, Oct. 12, 1904.)

[82 S. W. Rep. 382.]

Injury to Passenger—Res Gestæ—Remarks of Conductor.*

Evidence that immediately after a passenger was thrown from a street car, and while he was still on the ground, the conductor's attention was called thereto, and he replied, "Let him lay there and go to h—l!" is admissible, in an action against the railway company for the injury, as part of the *res gestæ*.

Appeal—Objection Not Made Below.

Complaint cannot be made on appeal of evidence as to which there was no objection or motion to exclude.

Injury to Passenger—Cross-Examination of Conductor—Impeaching Evidence.

Where, in an action for injury to a passenger who fell from a street car at the corner of P. and B. streets, H., the conductor, denied on cross-examination that several months after the accident he said to K. that he remembered of a man falling off at such place, and, on being told by K. that the man was still laid up by his injuries, told K. to say nothing about it, and K. testified that the conversation was had, the court should have admonished the jury that they could consider such evidence only on the question of the credit to be given to H.

Same—Fall from Street Car—Negligence and Contributory Negligence—Instructions.

In an action for injury to a passenger from falling from the rear platform of a street car, the court, after charging that, though the jury found defendant was negligent, yet, if they found plaintiff was also negligent, and but for his negligence he would not have been injured, they should find for defendant, continued: "Unless they also find that, notwithstanding plaintiff's negligence, defendant could have, by the exercise of ordinary care, or any degree of care, prevented the accident, then they will find for plaintiff:" *held*, that the latter part of the instruction should have been omitted, unless it was contended that the rear platform was a place of peril, in which case it should have been: "Unless they also find that, notwithstanding the negligence of plaintiff, defendant, its agents or servants, discovered his perilous

*See preceding case and foot-note.

South Covington & C. St. Ry. Co. v. Riegler's Adm'r

position in time to have and could have prevented the injury to him, and failed to do so, then they will find for plaintiff."

Same—Same—Contributory Negligence—Sufficiency of Evidence.

Testimony of witnesses in an action for injury to a passenger on a street car from falling from the rear platform that plaintiff told them that his injury was caused by his stepping off the car while it was in motion, is sufficient evidence of contributory negligence.

Same—Same—Care Required of Carrier—Instruction.

In an action for injury to a passenger on a street car from falling from the rear platform, an instruction defining the degree of care and diligence required of railway companies in the carriage of passengers should be given.

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by Lambert Riegler's administrator against the South Covington & Cincinnati Street Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

L. J. Crawford, for appellant.

Geo. Washington and Howard M. Benton, for appellee.

NUNN, J. This appeal is from a judgment of \$4,173 against appellant in favor of appellee on account of personal injuries received by Lambert Riegler while being carried as a passenger on one of appellant's cars. The evidence of appellee conduced to prove the following facts: Appellant ran cars on what is known as the "Patterson Street Line," and ever since its establishment many years ago, and up to the date of the injuries complained of, it had been the daily habit of Lambert Riegler, an old citizen of Newport, to ride upon this line morning and evening in going to and returning from his work in Cincinnati, Ohio, the cars stopping at Pearl and Broadway streets, in the latter city, to let him off when going to work. On the morning in question, Riegler, with three others, stood upon the rear platform, on account of the crowded condition of the car. The conductor was also upon the rear platform. Arriving at a point near Pearl and Broadway, Riegler plainly indicated by words and action that he desired to get off at his customary place. He took his position for that purpose, with one hand on the lateral bar attached to the car, and with the other grasping the upright bar at the rear of the platform. The car "slowed up" as if about to stop at the usual place, just south of the south intersection of Pearl and Broadway. Just before it reached a full stop, and before Riegler attempted to step from the car, but was merely preparing himself for that purpose, the car gave a sudden "jerk" or "lunge" forward, throwing Riegler to the ground with great violence, and seriously injuring and crippling him. That he was confined to his bed for about three months, and walked for a long time thereafter on crutches, and at the time of the trial his right leg was shorter by about an inch than the other, and was smaller in circum-

ference by an inch or more. That his medical bills amounted to more than \$50.

Appellant's conductor in charge of the car stated that he did not know that Riegler was on the car, and did not know that he desired to get off at Pearl and Broadway streets, and did not know that Riegler fell from the car or was injured. He denied that his attention was called instantly, and while Riegler was upon the ground, that he had fallen, or that he said in reply, "Let him lay there and go to h—ll!" Two witnesses—one for appellant and one for appellee—testified that they did call the conductor's attention to the fact that Riegler had fallen, and was then upon the ground, and that he did make this reply to them. Appellant claims that this was error, and prejudicial to its interest. We are of the opinion that this was competent as a part of the *res gestæ*. This conductor was asked upon cross-examination if, upon an occasion about three months after Riegler was injured, he did not say to one A. J. Keiper that he remembered of a man falling off the car at Pearl and Broadway streets, and, upon being told by Keiper that the man was still in bed from his injuries, he then said to Keiper to keep still, and not say anything about it. He denied having any such conversation with Keiper. Keiper was introduced, and testified that the conversation was had as related. The appellant contends that this was error. We could not reverse for this, even if it were an error, for the reason that the appellant did not object to this evidence, or move to have it excluded from the jury; but, as the judgment will have to be reversed for other errors appearing in the record, which we will mention hereafter, we speak of this that it may not be committed on the next trial. While this evidence could not be admitted as substantive, it was admissible to go to the credit of the witness Howder, the conductor, and the court should have admonished the jury, and told them for this purpose alone they could consider it.

Appellant introduced another of its conductors, who testified that on his return to Newport on his car he found Riegler injured at the point stated, and placed him on his car, and carried him home. He stated that Riegler, in answer to the question as to how he was injured, said he stepped off of the car while it was in motion, and it threw him down; that the car was moving faster than he thought it was. Appellant proved the same facts, in substance, by its car inspector.

The court gave three instructions. One of them—the third, on the measure of damages—is unobjectionable. The first one assumes that the agents and servants of appellant were negligent and unskillful in the management of this car from which Riegler fell. The second was as follows: "If the jury find for the plaintiff under the first instruction, but find that the plaintiff was also negligent at the time of the accident complained of, and but for such negligence on the

Quantz v. Southern Ry. Co

part of the plaintiff he would not have been injured, they will find for the defendant, unless they also find that, notwithstanding the negligence of the plaintiff, the defendant by agents and servants could have, by the exercise of ordinary or any degree of care, prevented said accident, then they will find for the plaintiff." The objectionable part of this instruction is all after and including the word "unless." The latter clause of this instruction should have been left off altogether, except it be contended that the back platform where appellant stood was a place of peril, then the latter clause should have been framed as follows: "Unless they also find that, notwithstanding the negligence of the plaintiff, the defendant, its agents or servants, discovered his perilous position in time to have and could have prevented the injury to him, and failed to do so, then they will find for the plaintiff." Appellee contends that, even if instruction No. 2 on contributory neglect was erroneous, it could not have been prejudicial to appellant, because, as claimed by him, there was not the slightest evidence showing contributory negligence on the part of the appellee. He is correct so far as the eye witnesses to the accident or injury are concerned, but appellee's counsel overlooks the statements of the conductor who carried Riegler to his home, and the car inspector, who claim that Riegler said to them that his injury was caused by his stepping off of the car while it was in motion. Riegler denied these statements, but the jury had a right to consider all the evidence, and give it the weight to which it was entitled; and this idea should have been presented to them by an instruction on contributory negligence. On the next trial the court should give an instruction defining the degree of care and diligence required of railway companies in the carriage of passengers as defined in the cases of the Louisville Railway Co. v. Park, 96 Ky. 580, 29 S. W. 455, Louisville City Railway Co. v. Weams, 80 Ky. 420, and Louisville S. R. Co. v. Minogue, 90 Ky. 369, 14 S. W. 357, 29 Am. St. Rep. 378.

For these reasons the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

QUANTZ v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, Dec. 6, 1904.)

[49 S. E. Rep. 79.]

Negligence—Injury to Licensee.*

A passenger alighted from the train at a depot at night, and for

*As to the care due persons, other than passengers, at stations and depots on business, see foot-note appended to *Sullivan v. Minneapolis, St. P. & S. S. M. Ry. Co.* (Minn.), 11 R. R. R. 725, 34 Am. & Eng. R. Cas., N. S., 725.

As to who are, and are not, passengers, see foot-note appended to

Quantz v. Southern Ry. Co

purposes of his own passed along an open space on the right of way used by the public by permission in passing from one street to another. He left the right of way, and went into an open door in the depot building 12 feet away, and fell down a stairway and was injured: *held*, that he was a licensee, and the railroad did not owe him the duty to keep the depot doors closed, but only of keeping the way free from dangers.

Appeal from Superior Court, Mecklenburg County; W. R. Allen, Judge.

Action by S. A. Quantz against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

The plaintiff reached Charlotte on defendant's train on the night of May —, 1904, at about 10 o'clock. The train stopped at the depot, the coach upon which defendant was being some distance below the end of the depot building. He went across the depot to a restaurant on Fourth street, not on defendant's right of way. He drank some coffee or milk, and, desiring to see a policeman, went from the restaurant towards Trade street, which runs the other side of the depot and parallel with Fourth street. In going towards Trade street he passed along an open space on the defendant's right of way, and just behind the depot building. This open space was unobstructed, and was, with the permission of the defendant, used by the public in passing from Fourth street to Trade street. About half way from Fourth street the depot building becomes wider, including the office, waiting room, dining room, etc. At this point there is an open way between the telegraph office and the baggage room. There is near this point, but not in the open way, a stairway. When plaintiff reached this point, he turned to go through the depot building to find the policeman. He saw through a window a light burning; saw the stairway going up in the inside. He crossed the curbing, and went to the door at the head of the stairway, being about 12 feet from the edge of the space. Finding the lattice door open, the plaintiff went in and fell, whereby he was injured. Standing at the back of the depot building, and looking through a window, a person could see the stairway on the inside of the building. A map accompanied the case on appeal, showing the depot and surroundings. The defendant at the close of the testimony moved the court to dismiss the action as upon a nonsuit. Motion denied. Defendant excepted. The only portion of the charge to which there was exception is as follows: "If you find from the evidence in this case that that street or passway was used by the public; that they were in the habit of using it, or that persons who wished to become passengers upon the trains of the defendant were in the habit of using

Quantz v. Southern Ry. Co

that passageway—then it became the duty of the defendant not to so construct its building, or not, to leave its building in such condition, that there would be either on or near the passaway a dangerous place, and not to construct it in such condition that one would be misled by the light in the building, and induced to enter a dangerous place. And if you find from the evidence that the defendant has been negligent in that respect, has failed in the performance of its duty, and that that was the cause of the injury to the plaintiff, then you would answer the first issue, 'Yes; that the plaintiff was injured by the negligence of the defendant.' ' From a judgment for the plaintiff, defendant appealed.

W. B. Rodman and G. F. Bason, for appellant.

C. D. Bennett, for appellee.

CONNOR, J. (after stating the case). His honor told the jury that the plaintiff had, at the time of his injury, ceased to be a passenger. In this we concur. We also concur in the opinion that he was not a trespasser. He was a licensee. His relation to the defendant growing out of the contract of carriage or the assumption of a public duty by the defendant was at an end. The case, thus simplified, presents the question as to the measure of duty which the defendant owed the plaintiff as a licensee. The plaintiff's right to recover is dependent upon sustaining the proposition that the defendant owed to him a duty, and that there was a breach thereof, which was the proximate cause of the injury. *Emry v. Navigation Co.*, 111 N. C. 94, 16 S. E. 18, 17 L. R. A. 699. It is conceded that the defendant did not owe to the plaintiff that high degree of care due a passenger. It is equally clear that it owed to him a higher degree of care than was due a trespasser. The authorities make a distinction between the degree of care due a mere licensee, one who by permission enters upon the premises of another, and one who does so by invitation. It is not always easy to say upon which side of this line a particular case falls. Assuming that the license given to the public to use this way to pass from Fourth to Trade street amounted to implied invitation to the plaintiff to enter upon and pass over it, we next inquire the extent of the license. It was to pass from Fourth to Trade street. The duty, therefore, of the defendant, was to keep the way free from dangerous obstructions or pitfalls, either on or so near to the way that a person exercising ordinary care would not be injured. The plaintiff went over the way for his own purpose, having no connection whatever with the defendant's duty to the public as a common carrier. There is no suggestion that there was any obstruction to prevent the plaintiff using the way to the full extent of his license. He went 12 feet out of his way to go to the front of the depot to look for a policeman for the purpose of ascertaining the whereabouts of a person whom he wished to find. There is

Chretien v. New Orleans Rys. Co

no suggestion that the open door was dangerously near to the open space. Certainly, the defendant was not required to so construct its depot, before the license was given, as to enable licensees to walk around about and enter it at all times by day or night for the purposes entirely disconnected with the use for which it was built. The defendant owed no duty to the plaintiff to keep all of the doors of the depot building closed at night. No reasonable person would apprehend that in using the open space for the purpose of passing from one street to another a person would go 12 feet out of the way, and step into an open door. We can see no breach of duty to the plaintiff. We have discussed the case upon the assumption that the plaintiff was an invited licensee. It is by no means clear that the license was more than permissive, in which case a lower degree of care is imposed. In any view of the testimony the defendant was not liable. *Sweeny v. R. R.*, 10 Allen, 368, 87 Am. Dec. 644; *Redigan v. R. R. (Mass.)* 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. Rep. 520. "One who attempts to cross a platform at a railroad station for his own convenience as a short cut from one street to another is a mere licensee, and cannot recover for an injury received by falling into a hole in such platform, although the railroad company had passively permitted the plaintiff and the public generally to use it." *Elliott on Railroads*, § 1251. We are of the opinion that the motion for nonsuit should have been allowed.

Error.

CHRETIEN v. NEW ORLEANS RYS. CO.

(Supreme Court of Louisiana, Dec. 19, 1904.)

[37 So. Rep. 716.]

Carriers—Electric Car—Injury to Passenger—Apprehension of Danger.*

While plaintiff's son was a passenger on one of the electric cars of the defendant company, a broken wire fell, just before day, striking the dashboard of the platform of the car. The lights went out upon the falling of the wire, and this was immediately followed by a flash and an explosion, similar to the explosion of a firecracker, but louder. Neither the car nor any of the passengers were injured, nor was any one frightened other than the plaintiff's son, who, standing near the open door at the rear of the car, under a first impulse, ran to the back platform and jumped from the car (running at a high speed) to the ground, striking his skull, and fracturing it, from which injury he died. Plaintiff claimed that the accident was the cause of his son's death, and that he was not guilty of contributory negligence.

Held: That the character of the impending danger, or, at least, its apparent character, is to be considered. If one acts unreasonably, or rashly, or becomes frightened at a trivial occurrence, not calculated to

*As to whether error of judgment, caused by fear, in attempting to avoid imminent danger constitutes contributory negligence. See footnote appended to *St. Louis & S. F. R. Co. v. Brock (Kan.)*, 12 R. R. R. 613, 35 Am. & Eng. R. Cas., N. S., 613.

Chretien v. New Orleans Rys. Co

alarm a reasonably prudent man, and thereby brings injury upon himself, there is no liability. The deceased must have acted upon reasonable apprehension. His conduct must have conformed to that of an ordinarily careful and prudent man under like circumstances. In considering whether there was justification for the passenger's action, it was proper to consider what the action of the other passengers was as part of the *res gestæ*, and was deemed prudent by those in the same situation having an interest to take the least and avoid the greatest danger. The speed of the car at the time was proper to be considered. (Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Eugene Chretien against the New Orleans Railways Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Anthony Joseph Rossi and Benjamin Rice Forman, for appellant.

Dart & Kernan, for appellee.

Statement of the Case.

NICHOLLS, J. The plaintiff claimed from the defendant \$20,000 as damages for the death of his son, Jerome Chretien, whose death, he alleged, was caused by its fault and negligence. Plaintiff alleged that the deceased was a passenger in one of the company's cars on the 17th of February, 1903, and was entitled, by his contract with it, to safe carriage.

Plaintiff averred that while his son was so riding as a passenger on the car it was so defective that there was a loud and dangerous explosion of electric energy, endangering the life and limbs of passengers, filling the car suddenly with light and fire, whereby his said son either rushed from the car to escape the imminent threatened danger, or was thrown from said car and fell, striking his head on the rail, and breaking his skull; that he lingered from the 17th until the 23d of February, 1903, when he died from said injuries.

Plaintiff alleged that the loss of his son was caused by the defendant's negligence and breach of contract; that it could have prevented said injury, and did not do so; that there was no negligence nor fault on the part of his son.

Defendant answered, and, after pleading the general issue, it denied specially that the death of plaintiff's son resulted from its negligence or want of care, but averred that, on the contrary, his injury, suffering, and death were due entirely to his own want of care and caution and gross negligence in the premises. In the event that any contributory negligence should appear in the case, defendant averred that deceased was guilty of contributory negligence, and brought about his own injury.

The case was tried by jury, which returned a verdict in favor of the defendant.

A motion for a new trial, based on the ground that the ver-

Chretien v. New Orleans Rys. Co

dict was contrary to the law and the evidence, being overruled, judgment was rendered in favor of the defendant, and plaintiff appealed.

Opinion.

The evidence shows that on the morning of the 17th February, 1903, at about 4:30 o'clock in the morning, while it was yet dark, Jerome Chretien, a son of the plaintiff, entered as a passenger, at the corner of Esplanade and Mystery streets, one of the electric cars owned and operated by the defendant. As the car moving forward later approached Crete street, the trolley wire parted and fell. In so doing it struck the dashboard front platform of the car when it fell, and the lights on the car went out, but immediately afterwards there was a flash or lighting up on the front platform, accompanied by a popping noise, but louder; like that made by the burning of a fire cracker.

Chretien was at that time leaning upon one side of the car door, which was then open, talking to the conductor, who was upon the rear platform. The falling of the wire, the flashing of the light, and the noise referred to were practically simultaneous; the whole not occupying more than a few seconds. When this occurred, the conductor rang his bell three times as a signal to the motorman to immediately stop, and went forward into the inside of the car to ascertain what had happened. As he did so, Chretien (acting evidently upon a first impulse) ran outside of the car upon the rear platform, and jumped from it into the street. The car was moving at the time with speed, and Chretien, as he touched the ground, fell with such force as to fracture his skull, and from this fracture, after lingering a day or so, he died. Had he remained upon the car, he would have received no injury. There were in the car at the time of the falling of the wire four persons, two of the four being men employed by the defendant company as conductors who were on the way to take up their employment for the day, Chretien, and one passenger besides himself. On the front and rear platforms of the car were its conductor and motorman at their stations. No one of these men was hurt in the slightest degree, and none save Chretien were at all frightened or made apprehensive by what had occurred. The car itself was not injured, nor does any part of it appear to have been even scorched. The testimony of the persons who were inside the car was at variance with that of Pourpart, one of plaintiff's witnesses, as to the car being enveloped on the outside by light or flames.

The current being cut off by the falling of the wire, the car stopped as soon as it lost the momentum which it then had. A repair force was immediately telephoned for by the conductor, which reached the place in about 15 minutes.

The man in charge of the repair work found that a trolley wire had fallen, one end of which was lying behind the car

Chretien v. New Orleans Rys. Co

and between the tracks crossing one of the rails; the other end still attached above. An examination disclosed the fact that the end of the fallen wire had become annealed for some considerable distance, which annealing, under the evidence, had the effect of softening the wire and rendering it pliable, so that it could be easily twisted, and also of discoloring it.

The evidence of neither the plaintiff nor the defendant disclosed what occasioned the falling of the wire. Plaintiff's counsel suggests that the wire was inherently weak, and that the annealed condition of the wire showed it must have been injured before the accident; but the evidence establishes, we think, that that condition followed as the result of the falling of the wire, and was not its producing cause. Defendant's evidence shows that there had been no defect in the wire apparent to the eye prior to the accident; that everything seemed right upon the line; and that it had been quite recently thoroughly and closely inspected.

Whatever may have been the cause, it is clear that the accident in itself and of itself was harmless. Assuming that defendant company was in point of fact in some way careless in respect to the wire, it would by no means follow that because of such carelessness it would be responsible for the injury to Chretien. If the connection between the falling wire and Chretien's injuries was simply that the latter, springing from an electric car running at high speed into a stony street, upon his assumption that by the falling of the wire he would be placed in danger of his life, or would receive great bodily harm, the company could not be held liable for his acting upon a wrong assumption when the circumstances of the case were not such as would have given rise reasonably to such assumption or apprehension on the part of an ordinarily prudent and careful person. The plaintiff states the position he contends for in the syllabus of his brief as follows:

"If a railroad company so operate its trains as to place its passengers in a position apparently so dangerous and hazardous as to create in their minds a reasonable apprehension of peril and injury, and thereby excite their alarm, and induce them to make efforts to escape, and in such efforts they receive personal injury, it is responsible in damages," etc. *Green v. Pacific Lumber Co.* (Cal.) 62 Pac. 747; *Wanzer v. Ry. Co.* (Wis.) 84 N. W. 423; *Railroad Co. v. Hicky*, 5 App. D. C. 436; *Meesel v. Railroad Co.*, 90 Mass. 234; *Bischoff v. Railway Co.* (Mo.) 25 S. W. 908; *Kermon v. Gilmer* (Mont.) 2 Pac. 21.

Defendant contends that the principle controlling the decision of this case is a familiar one, and that it has been applied by the court in several cases, but that the exact question presented by the facts has not yet been passed upon here. Counsel cite *Lehman v. Railroad Co.*, 37 La. Ann. 708;

Chretien v. New Orleans Rys. Co

Odom v. Railroad Co., 45 La. Ann. 1204, 14 South. 734, 23 L. R. A. 152; *Russel v. Shreveport Railroad*, 50 La. Ann. 501, 23 South. 466; *Stokes v. Saltonstall*, 13 Pet. 191, 10 L. Ed. 115; *South Covington & Cincinnati Street Railroad Co. v. Ware*, 84 Ky. 270, 1 S. W. 493; 2 *Rorer on Railroads*, pp. 1092, 1093; *Pierce on Am. Railroad Law* (1st Ed.) 475; *Id.* (Later Ed.) 329; *Thompson on Negligence*, vol. 2, p. 1092 (Early Ed.); *Beach on Contributory Negligence* (3d Ed.) 88 40, 41; *Card v. Ellsworth*, 65 Me. 547, 20 Am. Rep. 722; *Shannon v. B. & A. R. R.*, 78 Me. 52, 2 Atl. 678; *Twomley v. Central Park R. R.*, 69 N. Y. 158, 25 Am. Rep. 163.

Plaintiff's counsel say:

"That through some defect the trolley wire or electric conductor through which the electric energy was conveyed to the motor broke and fell upon the car, and caused a sudden blaze of light, apparently enveloping the car, and a loud noise or report, as of an explosion. Chretien had reasonable cause to apprehend that his life was in imminent danger from electricity, and that he was in great danger of instant death, and, seeking to escape from that danger, he jumped from the car and fell, and struck his head on the rail, fractured his skull, and, after lingering, died."

Defendant's counsel insist that, conceding for argument (which, they did not in fact admit) that the company had been guilty of negligence in not preventing the falling of the wire, the question for examination was whether the circumstances were such as to create in the mind of an ordinarily prudent person a reasonable fear or apprehension of bodily injury. They say that they were not of such character. They assert that:

"Neither the motorman nor the conductor left their positions, and, judging by the evidence, no other person in the car attached any importance to the incident. It apparently made no impression on them of fear or danger. * * * The jury evidently did not believe the version of Pourpart [one of plaintiff's witnesses] that the car was surrounded by flames covering it from top to bottom, and they were justified in that conclusion; and the most perfect contradiction was the fact that there was no mark on the body of the car showing the presence of fire, flames, or smoke."

The sudden going out of the lights in an electric car is not an unusual occurrence. Any one who travels in those vehicles has undergone the experience, and must have noticed the movement of the light when the trolley is adjusted to the wire, and must have heard the popping or blowing out of a fuse. Counsel maintain that, even if Chretien left the car under the agitation of fear and apprehension, he was not justified in so acting, and this notwithstanding the company may have been primarily guilty of negligence in causing the fear or apprehension; that it was not every trivial or common place accident happening in or with the vehicles of locomotion

which would justify one in taking such desperate chances as he took. The law did not allow one to do a thing of this kind, and recover, even though the railroad company was in fault. Under the settled jurisprudence, Chretien is shown to have acted in a manner unusual and extraordinary, without sufficient justification or provocation, and his unfortunate accident could not be attributed to the defendant.

The following language, which defendant's counsel quote as having been used in the case reported in 84 Ky. 270, 1 S. W. 493, meets with our approval:

"The character of the impending danger, or at least its apparent character, is to be considered. If one acts unreasonably, rashly, or becomes frightened at a trivial occurrence not calculated to alarm a reasonably prudent man, and thereby brings injury upon himself, there is no liability. It is urged that when one is frightened by something resulting from the neglect of the carrier he cannot be charged with contributory negligence to any accident. He, however, must act upon reasonable apprehension of peril. His conduct must conform to that of an ordinarily careful man under like circumstances. He has no right, upon the happening of some trivial occurrence, or such as would not create fear or apprehension of injury in the mind of an ordinarily prudent and careful person, to bring injury upon himself, and then recover damages by reason of it."

We also recognize the force of the proposition that in considering whether there was justification for the passenger's action it is proper to consider what the action of the other passengers was as a part of the *res gestæ*, and what was deemed prudent by those in the same situation having an interest to take the least and avoid the greatest hazard. One of the tests of justification, among others, is to determine what careful persons generally would be likely to do in similar circumstances. The speed of the train, and the other circumstances connected with the occurrence, are also proper to be considered. 78 Me. 52, 2 Atl. 678; 69 N. Y. 158, 25 Am. Rep. 163.

The jury in the present case was obviously of the opinion that Chretien's conduct in jumping from the car, as shown by the evidence, was not justified by a reasonable apprehension entertained by him from the surrounding circumstances that his life was in danger, or that he was in danger of great bodily harm. There is nothing in the evidence which would warrant or justify us in declaring that the jury's conclusions were erroneous.

Finding no error, the judgment appealed from is hereby affirmed.

AMERICAN EXPRESS COMPANY and R. M. COFFIN, Plffs. in Err., v. STATE OF IOWA.

(Argued December 2, 1904. Decided January 3, 1905.)

[25 Sup. Ct. Rep. 182.]

Error to State Court—Decision on Nonfederal Ground.

A writ of error to review a decision of a state court upholding a seizure, under the state laws, of intoxicating liquors shipped C. O. D. into that state from another state, on the ground that the sale was completed in the former state, will not be dismissed on the theory that its ruling rests upon a non-Federal ground broad enough to sustain it, where the protection of the commerce clause of the Federal Constitution was directly invoked in the state court.

C. O. D. Shipments of Intoxicating Liquors—Seizure under Statute Law—Interstate Commerce.*

Intoxicating liquors shipped C. O. D. from one state into another cannot be subjected to seizure under the laws of the latter state, while in the hands of the express company, without infringing the commerce clause of the Federal Constitution.

In error to the Supreme Court of the State of Iowa to review a judgment which reversed a judgment of the Tama District Court, which had reversed a judgment of a justice's court, sustaining a seizure of intoxicating liquors shipped C. O. D. into the state from Illinois, while in the hands of the express company's agent at the place of delivery. Reversed and remanded for further proceedings.

See same case below, 118 Iowa, 447, 92 N. W. 66.

Statement by MR. JUSTICE WHITE:

The American Express Company received at Rock Island, Illinois, on or about March 29, 1900, four boxes of merchandise to be carried to Tama, Iowa, to be there delivered to four different persons, one of the packages being consigned to each. The shipment was C. O. D., \$3 to be collected on each package, exclusive of 35 cents for carriage on each. On March 31 the merchandise reached Tama, and on that day was seized in the hands of the express agent. This was based on an information before a justice of the peace, charging that the packages contained intoxicating liquor held by the express company for sale. The express company and its agent answered, setting up the receipt of the packages in Illinois, not for sale in Iowa, but for carriage and delivery to the consignees. An agreed statement of facts was stipulated admitting the receipt, the carriage, and the holding of the packages as above stated. The seizure was sustained. Appeal was taken to a district court. The express company and its agent amended their answer, especially setting up the commerce clause of the Constitution of the United States. There was judgment in favor of the express company, and the

*See *Norfolk & W. Ry. Co. v. Sims* (U. S.), 11 R. R. R. 634, 34 Am. & Eng. R. Cas., N. S., 634.

Am. Express Co. &c. v. State of Iowa

state of Iowa appealed to the supreme court and obtained a reversal. 118 Iowa, 447, 92 N. W. 66. This writ of error was prosecuted.

Mr. Lewis Cass Ledyard for plaintiffs in error.

Mr. Charles W. Mullan for defendant in error.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court:

Although the majority of the supreme court of Iowa doubted the correctness of a ruling previously made by that court, nevertheless it was adhered to under the rule of stare decisis, and was made the basis of the decision in his cause. In the previous case it was held by the supreme court of Iowa that, where merchandise was received by a carrier with a duty to collect the price on delivery to the consignee, the merchandise remained the property of the consignor, and was held by the carrier as his agent with authority to complete the sale. Upon this premise it was decided that intoxicating liquors shipped C. O. D. from another state were subject to be seized on their arrival in Iowa, in the hands of the express company. Sustaining, upon this principle, the seizure in this case, the supreme court of Iowa did not expressly consider the defense based on the commerce clause of the Constitution of the United States, because the court deemed that its ruling on the subject of the effect of the C. O. D. shipment was a wholly non-Federal ground, broad enough to sustain the conclusion reached. And this the court considered was sanctioned by *O'Neil v. Vermont*, 144 U. S. 324, 36 L. Ed. 450, 12 Sup. Ct. Rep. 693.

In accord with the opinion of the supreme court of Iowa it is insisted at bar that this writ of error should be dismissed for want of jurisdiction, because the decision below involved no Federal question, and the case of *O'Neil v. Vermont*, 144 U. S. 324, 36 L. Ed. 450, 12 Sup. Ct. Rep. 693, is relied upon. The contention is untenable. As pointed out in *Norfolk & W. R. Co. v. Sims*, 191 U. S. 446, 48 L. Ed. 256, 24 Sup. Ct. Rep. 151, the view taken of the *O'Neal Case* is a mistaken one. True, in that case the supreme court of Vermont gave to a C. O. D. shipment the effect attributed to it by the supreme court of Iowa in this case. True, also, a writ of error was prosecuted from this court to the Vermont court upon the assumption that the commerce clause of the Constitution was involved, but this court dismissed the writ of error because it did not appear that the commerce clause of the Constitution was relied on in the state court, was in anyway called to the attention of that court, or was passed upon by it. As on this record it appears that the protection of the commerce clause was directly invoked in the state court, it is apparent that the *O'Neil Case* is inapposite. And as, in order to decide the contention that the judgment below rests upon an adequate non-Federal ground, we must

Am. Express Co. &c. v. State of Iowa

necessarily consider how far the C. O. D. shipment was protected by the commerce clause of the Constitution, which is the question on the merits, we pass from the motion to dismiss to the consideration of the rights asserted under the commerce clause of the Constitution.

We can best dispose of such asserted rights by a brief reference to some of the controlling adjudications of this court.

In *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 31 L. Ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062, it was held that the statutes of Iowa forbidding common carriers from bringing intoxicating liquors into the state of Iowa from another state or territory without obtaining a certificate required by the laws of Iowa was void, as being a regulation of commerce between the states, and, therefore, that those laws did not justify a common carrier in Illinois from refusing to receive and transport intoxicating liquors consigned to a point within the state of Iowa.

In *Leisy v. Hardin*, 135 U. S. 100, 34 L. Ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, it was held that a law of the state of Iowa, forbidding the sale of liquor in that state, could not be made to apply to liquors shipped from another state into Iowa, before the merchandise had been delivered in Iowa, and there sold in the original package, without causing the statute to be a regulation of commerce, repugnant to the Constitution of the United States. In *Rhodes v. Iowa*, 170 U. S. 412, 42 L. Ed. 1088, 18 Sup. Ct. Rep. 664, the same doctrine was reiterated, except that it was qualified to the extent called for by the provisions of the act of Congress of August 8, 1891 (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), commonly known as the Wilson act. In that case a shipment of intoxicating liquors had been made into the state of Iowa from another state, and the agent of the ultimate railroad carrier in Iowa was proceeded against for an alleged violation of the Iowa law, because, when the merchandise reached its destination in Iowa, he had moved the package from the car in which it had been transported to a freight depot, preparatory to delivery to the consignee. The contention was that, as by the Wilson act, the power of the state operated upon the property the moment it passed the state boundary line; therefore the state of Iowa had the right to forbid the transportation of the merchandise within the state, and to punish those carrying it therein. This was not sustained. The court declined to express an opinion as to the authority of Congress, under its power to regulate commerce, to delegate to the states the right to forbid the transportation of merchandise from one state to another. It was, however, decided that the Wilson act manifested no attempt on the part of Congress to exert such power, but was only a regulation of commerce, since it merely provided, in the case of intoxicating liquors, that such merchandise, when transported from one state to another, should lose its character as inter-

state commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original packages.

The doctrine of the foregoing cases was applied in *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 442, 42 L. Ed. 1100, 1102, 18 Sup. Ct. Rep. 674, to the right of a citizen of South Carolina to order from another state, for his own use, merchandise, consisting of intoxicating liquors, to be delivered in the state of South Carolina.

Coming to test the ruling of the court below by the settled construction of the commerce clause of the Constitution, expounded in the cases just reviewed, the error of its conclusion is manifest. Those cases rested upon the broad principle of the freedom of commerce between the states, and of the right of a citizen of one state to freely contract to receive merchandise from another state, and of the equal right of the citizen of a state to contract to send merchandise into other states. They rested, also, upon the obvious want of power of one state to destroy contracts concerning interstate commerce, valid in the states where made. True, as suggested by the court below, there has been a diversity of opinion concerning the effect of a C. O. D. shipment, some courts holding that, under such a shipment, the property is at the risk of the buyer, and therefore that delivery is completed when the merchandise reaches the hands of the carrier for transportation; others deciding that the merchandise is at the risk of the seller, and that the sale is not completed until the payment of the price, and delivery to the consignee, at the point of destination.

But we need not consider this subject. Beyond possible question, the contract to sell and ship was completed in Illinois. The right of the parties to make a contract in Illinois for the sale and purchase of merchandise, and, in doing so, to fix by agreement the time when and condition on which the completed title should pass, beyond question. The shipment from the state of Illinois into the state of Iowa of the merchandise constituted interstate commerce. To sustain, therefore, the ruling of the court below would require us to decide that the law of Iowa operated in another state so as to invalidate a lawful contract as to interstate commerce made in such other state; and, indeed, would require us to go yet further, and say that, although, under the interstate commerce clause, a citizen in one state had a right to have merchandise consigned from another state delivered to him in the state to which the shipment was made, yet that such right was so illusory that it only obtained in cases where, in a legal sense, the merchandise contracted for had been delivered to the consignee at the time and place of shipment.

When it is considered that the necessary result of the ruling below was to hold that, wherever merchandise shipped from one state to another is not completely delivered to the

buyer at the point of shipment so as to be at his risk from that moment, the movement of such merchandise is not interstate commerce, it becomes apparent that the principle, if sustained, would operate materially to cripple, if not destroy, that freedom of commerce between the states which it was the great purpose of the Constitution to promote. If upheld, the doctrine would deprive a citizen of one state of his right to order merchandise from another state at the risk of the seller as to delivery. It would prevent the citizen of one state from shipping into another unless he assumed the risk; it would subject contracts made by common carriers, and valid by the laws of the state where made, to the laws of another state; and it would remove from the protection of the interstate commerce clause all goods on consignment upon any condition as to delivery, express or implied. Besides, it would also render the commerce clause of the Constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of interstate commerce by means of bills of lading to the shipper's order, with drafts for the purchase price attached, and many other transactions essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof.

But general considerations need not be further adverted to in view of prior decisions of this court relating to the identical question here presented. In *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. Ed. 336, 23 Sup. Ct. Rep. 229, the facts were these: The Chicago Portrait Company shipped to Greensboro, North Carolina, by rail, consigned to its order, certain pictures and frames. At Greensboro the company had an agent who received the merchandise, put the pictures and frames together, and delivered them to the purchasers who had ordered them from Chicago. The contention was that the portrait company was liable to a license charge imposed by the town of Greensboro for selling pictures therein, and this was supported by the argument that, although the contract for sale was made in Chicago, it was completed in North Carolina by the assembling of the pictures and frames, and the delivery there made. It was held that the license could not be collected, because the transaction was an interstate commerce one. In the course of the opinion, after a full review of the authorities, it was observed (p. 632, L. Ed. p. 341, Sup. Ct. Rep. p. 233):

"It would seem evident that if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight, by rail, and were received at the railroad station by an agent, who delivered them to the respective

purchasers, in no wise changes the character of the commerce as interstate."

In *Norfolk & W. R. Co. v. Sims*, 191 U. S. 441, 48 L. Ed. 254, 11 R. R. R. 634, 34 Am. & Eng. R. Cas., N. S., 634, 24 Sup. Ct. Rep. 151, these were the facts: A resident of North Carolina ordered from a corporation in Chicago a sewing machine. The machine was shipped under a bill of lading to the order of the buyer, but this bill of lading was sent to the express agent at the point of delivery in North Carolina, with instructions to surrender the bill on payment of a C. O. D. charge. The contention was that the consummation of the transaction by the express agent in transferring the bill of lading upon payment of the C. O. D. charge was a sale of the machine in North Carolina, which subjected the company to a license tax. The contention was held untenable. Calling attention to the fact that the contract of sale was completed as a contract in Chicago, and after reviewing some of the authorities on the subject of interstate commerce, the court said (p. 450, L. Ed. p. 258, Sup. Ct. Rep. p. 154):

"Indeed, the cases upon this subject are almost too numerous for citation, and the one under consideration is clearly controlled by them. The sewing machine was made and sold in another state, shipped to North Carolina in its original package for delivery to the consignee upon payment of its price. It had never become commingled with the general mass of property within the state. While technically the title of the machine may not have passed until the price was paid, the sale was actually made in Chicago; and the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exception of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce."

The controlling force of the two cases last reviewed upon this becomes doubly manifest when it is borne in mind that the power of the states to levy general and undiscriminating taxes on merchandise shipped from one state into another may attach to such merchandise before sale in the original package when the merchandise has become at rest within the state, and therefore enjoys the protection of its laws, and this upon the well-recognized distinction that the movement of merchandise from state to state, whilst constituting interstate commerce, is not an import in the technical sense of the Constitution. *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. Ed. 538, 24 Sup. Ct. Rep. 365.

As from the foregoing considerations it results that the court below erred in refusing to apply and enforce the commerce clause of the Constitution of the United States, its judgment must be reversed.

The judgment of the Supreme Court of Iowa is reversed, and the cause is remanded to that court for proceedings not inconsistent with this opinion.

MR. JUSTICE HARLAN dissents.

W. O. JOHNSON, Petitioner, *v.* SOUTHERN PACIFIC COMPANY.
W. O. JOHNSON, Plff. in Err., *v.* SOUTHERN PACIFIC COMPANY.

(Argued October 31, 1904, Decided December 19, 1904.)

[25 Sup. Ct. Rep. 158.]

Automatic Coupler Act—Application of Federal Statute—Locomotives.

Locomotives are embraced by the words "any car" in the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 2, prohibiting common carriers from using any car in moving interstate commerce not equipped with automatic couplers, although locomotives were, elsewhere in the statute, in terms required to be equipped with power driving-wheel brakes.

Same—Rule for Construction of Statute.

The doctrine that statutes in derogation of the common law are to be construed strictly does not demand that the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), compelling interstate carriers to adopt automatic couplers, in which there is an undoubted intention to make some change in the existing law, should be so construed as to defeat the obvious object of Congress.

Same—Same.

The rule that penal statutes are to be construed strictly does not permit such a construction as defeats the obvious intention of the legislature.

Same—Compliance with Statute.

The equipment of a locomotive and a dining car with automatic couplers, but of such different types as not to couple with each other automatically, does not satisfy the provision of the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 2, prohibiting common carriers from using any car in moving interstate commerce not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Same—Compliance with Statute.

Automatic couplers which will both couple and can be uncoupled without the necessity of men going between the cars are what are meant by the provision of the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 2, prohibiting common carriers from using any car in moving interstate commerce not equipped with "couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Same—Application of Statute—Dining Car.*

A dining car in constant use is, while waiting for the train to be made up for its next interstate trip, "used in moving interstate traffic" within the meaning of the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 2, requiring common carriers to equip with automatic couplers any car so used.

On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Utah, entered on a directed verdict in favor of defendant in an action to recover damages for personal injuries. Also

In error to the United States Circuit Court of Appeals for

*For authorities in this series on the question whether or not a carrier was engaged in moving interstate commerce on a certain occasion, see foot-note appended to *United States v. Geddes* (C. C. A.), 12 R. R. 497, 35 Am. & Eng. R. Cas., N. S., 497, where all preceding authorities in this series are collected.

Johnson v. Southern Pacific Co

the Eighth Circuit to review the same judgment. Judgments of both courts reversed and the cause remanded to the Circuit Court, with instructions to set aside the verdict, and award a new trial.

See same case below, 54 C. C. A. 508, 117 Fed. 462.

Statement by MR. CHIEF JUSTICE FULLER:

Johnson brought this action in the district court of the first judicial district of Utah against the Southern Pacific Company to recover damages for injuries received while employed by that company as a brakeman. The case was removed to the circuit court of the United States for the district of Utah by defendant on the ground of diversity of citizenship.

The facts were briefly these: August 5, 1900, Johnson was acting as head brakeman on a freight train of the Southern Pacific Company, which was making its regular trip between San Francisco, California, and Ogden, Utah. On reaching the town of Promontory, Utah, Johnson was directed to uncouple the engine from the train and couple it to a dining car, belonging to the company, which was standing on a side track, for the purpose of turning the car around preparatory to its being picked up and put on the next west-bound passenger train. The engine and the dining car were equipped, respectively, with the Janney coupler and the Miller hook, so called, which would not couple together automatically by impact, and it was, therefore, necessary for Johnson, and he was ordered, to go between the engine and the dining car, to accomplish the coupling. In so doing Johnson's hand was caught between the engine bumper and the dining car bumper, and crushed, which necessitated amputation of the hand above the wrist.

On the trial of the case, defendant, after plaintiff had rested, moved the court to instruct the jury to find in its favor, which motion was granted, and the jury found a verdict accordingly, on which judgment was entered. Plaintiff carried the case to the circuit court of appeals for the eighth circuit, and the judgment was affirmed. 54 C. C. A. 508, 117 Fed. 462.

Messrs. W. L. Maginnis, L. A. Shaver, and John M. Gitterman for petitioner and plaintiff in error.

Messrs. Maxwell Evarts, Martin L. Clardy, and Henry G. Herbel for respondent and defendant in error.

Solicitor General Hoyt and Attorney General Moody for the United States.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court:

This case was brought here on certiorari, and also on writ of error, and will be determined on the merits, without discussing the question of jurisdiction as between the one writ and the other. Pullman's Palace Car. Co. v. Central

Johnson v. Southern Pacific Co

Transp. Co., 171 U. S. 138, 145, 43 L. Ed. 108, 111, 18 Sup. Ct. Rep. 808.

The plaintiff claimed that he was relieved of assumption of risk under common-law rules by the act of Congress of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), entitled "An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip their Cars with Automatic Couplers and Continuous Brakes and their Locomotives with Driving-Wheel Brakes, and for Other Purposes."

The issues involved questions deemed of such general importance that the government was permitted to file brief and be heard at the bar.

The act of 1893 provided:

"That from and after the first day of January, eighteen hundred and ninety eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system. . . .

"Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed, and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred."

"Sec. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

The circuit court of appeals held, in substance, Sanborn, J., delivering the opinion and Lochren, J., concurring, that the locomotive and car were both equipped as required by the act, as the one had a power driving-wheel brake and the other a coupler; that § 2 did not apply to locomotives; that at the

Johnson v. Southern Pacific Co

time of the accident the dining car was not "used in moving interstate traffic;" and, moreover, that the locomotive, as well as the dining car, was furnished with an automatic coupler, so that each was equipped as the statute required if § 2 applied to both. Thayer, J., concurred in the judgment on the latter ground, but was of opinion that locomotives were included by the words "any car" in the 2d section, and that the dining car was being "used in moving interstate traffic."

We are unable to accept these conclusions, notwithstanding the able opinion of the majority, as they appear to us to be inconsistent with the plain intention of Congress, to defeat the object of the legislation, and to be arrived at by an inadmissible narrowness of construction.

The intention of Congress, declared in the preamble and in §§ 1 and 2 of the act, was "to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes," those brakes to be accompanied with "appliances for operating the train brake system;" and every car to be "equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," whereby the danger and risk consequent on the existing system was averted as far as possible.

The present case is that of an injured employee, and involves the application of the act in respect of automatic couplers, the preliminary question being whether locomotives are required to be equipped with such couplers. And it is not to be successfully denied that they are so required if the words "any car" of the 2d section were intended to embrace, and do embrace, locomotives. But it is said that this cannot be so because locomotives were elsewhere, in terms, required to be equipped with power driving-wheel brakes, and that the rule that the expression of one thing excludes another applies. That, however, is a question of intention, and as there was special reason for requiring locomotives to be equipped with power driving-wheel brakes, if it were also necessary that locomotives should be equipped with automatic couplers, and the word "car" would cover locomotives, then the intention to limit the equipment of locomotives to power driving-wheel brakes, because they were separately mentioned, could not be imputed. Now it was as necessary for the safety of employees in coupling and uncoupling that locomotives should be equipped with automatic couplers as it was that freight and passenger and dining cars should be; perhaps more so, as Judge Thayer suggests, "since engines have occasion to make couplings more frequently."

And manifestly the word "car" was used in its generic sense. There is nothing to indicate that any particular kind of car was

Johnson v. Southern Pacific Co

meant. Tested by context, subject matter, and object, "any car" meant all kinds of cars running on the rails, including locomotives. And this view is supported by the dictionary definitions and by many judicial decisions, some of them having been rendered in construction of this act. *Winkler v. Philadelphia & R. R. Co.*, 4 Penn. (Del.) 387, 53 Atl. 90; *Fleming v. Southern R. Co.*, 131 N. C. 476, 42 S. E. 905; *East St. Louis Connecting R. Co. v. O'Hara*, 150 Ill. 580, 37 N. E. 917; *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262; *Thomas v. Georgia R. & Bkg. Co.*, 38 Ga. 222; *New York v. Third Ave. R. Co.*, 117 N. Y. 404, 22 N. E. 755; *Benson v. Chicago, St. P. M. & O. R. Co.*, 75 Minn. 163, 74 Am. St. Rep. 444, 77 N. W. 798.

The result is that if the locomotive in question was not equipped with automatic couplers, the company failed to comply with the provisions of the act. It appears, however, that this locomotive was in fact equipped with automatic couplers, as well as the dining car; but that the couplers on each, which were of different types, would not couple with each other automatically, by impact, so as to render it unnecessary for men to go between the cars to couple and uncouple.

Nevertheless, the circuit court of appeals was of opinion that it would be an unwarrantable extension of the terms of the law to hold that where the couplers would couple automatically with couplers of their own kind, the couplers must so couple with couplers of different kinds. But we think that what the act plainly forbade was the use of cars which could not be coupled together automatically by impact, by means of the couplers actually used on the cars to be coupled. The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the end of the cars; and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other. The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars.

If the language used were open to construction, we are constrained to say that the construction put upon the act by the circuit court of appeals was altogether too narrow.

This strictness was thought to be required because the common-law rule as to the assumption of risk was changed by the act, and because the act was penal.

The dogma as to the strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law; and as there is no doubt of that intention here, the extent of the application of the change demands at least no more rigorous construction than would be applied to penal laws.

And, as Chief Justice Parker remarked, conceding that statutes in derogation of the common law are to be construed strictly, "They are also to be construed sensibly, and with a view to the object aimed at by the legislature." *Gibson v. Jenney*, 15 Mass. 205.

The primary object of the act was to promote the public welfare by securing the safety of employees and travelers; and it was in that aspect remedial; while for violations a penalty of \$100, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs,—that rule not requiring absolute strictness of construction. *Taylor v. United States*, 3 How. 197, 11 L. Ed. 559; *United States v. Stowell*, 133 U. S. 1, 12, 33 L. Ed. 555, 558, 10 Sup. Ct. Rep. 244, and cases cited. And see *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 35, 23 L. Ed. 196, 199; *Gray v. Bennett*, 3 Met. 529.

Moreover, it is settled that "though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature." *United States v. Lacher*, 134 U. S. 624, 33 L. Ed. 1080, 10 Sup. Ct. Rep. 625. In that case we cited and quoted from *United States v. Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740, in which Mr. Justice Story, referring to the rule that penal statutes are to be construed strictly, said:

"I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute which has various known significations, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature."

Tested by these principles, we think the view of the circuit court of appeals, which limits the 2d section to merely providing automatic couplers, does not give due effect to the words "coupling automatically by impart, and which can be

uncoupled without the necessity of men going between the cars," and cannot be sustained.

We dismiss, as without merit, the suggestion which has been made, that the words "without the necessity of men going between the ends of the cars," which are the test of compliance with § 2, apply only to the act of uncoupling. The phrase literally covers both coupling and uncoupling; and if read, as it should be, with a comma after the word "uncoupled," this becomes entirely clear. *Chicago, M. & St. P. R. Co. v. Voelker*, 129 Fed. 522; *United States v. Lacher*, 134 U. S. 624, 33 L. Ed. 1080, 10 Sup. Ct. Rep. 625.

The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically. True, no particular design was required, but, whatever the devices used, they were to be effectively interchangeable. Congress was not paltering in a double sense. And its intention is found "in the language actually used, interpreted according to its fair and obvious meaning." *United States v. Harris*, 177 U. S. 309, 44 L. Ed. 782, 20 Sup. Ct. Rep. 609.

That this was the scope of the statute is confirmed by the circumstances surrounding its enactment, as exhibited in public documents to which we are at liberty to refer. *Binns v. United States*, 194 U. S. 486, 495, 48 L. Ed. 1087, 1091, 24 Sup. Ct. Rep. 810; *Church of Holy Trinity v. United States*, 143 U. S. 457, 463, 36 L. Ed. 226, 229, 12 Sup. Ct. Rep. 511.

President Harrison, in his annual messages of 1889, 1890, 1891, and 1892, earnestly urged upon Congress the necessity of legislation to obviate and reduce the loss of life and the injuries due to the prevailing method of coupling and braking. In his first message he said: "It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce, and the use of improved safety appliances upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war."

And he reiterated his recommendation in succeeding messages, saying in that for 1892: "Statistics furnished by the Interstate Commerce Commission show that during the year ending June 30, 1891, there were forty-seven different styles of car couplers reported to be in use, and that during the same period there was 2,660 employees killed and 26,140 injured. Nearly 16 per cent. of the deaths occurred in the coupling and uncoupling of cars, and over 36 per cent. of the injuries had the same origin."

The Senate report of the first session of the Fifty-second

Johnson v. Southern Pacific Co

Congress (No. 1049) and the House report of the same session (No. 1678) set out the numerous and increasing casualties due to coupling, the demand for protecting, and the necessity of automatic couplers, coupling interchangeably. The difficulties in the case were fully expounded and the result reached to require an automatic coupling by impacts so as to render it unnecessary for men to go between the cars; while no particular device or type was adopted, the railroad companies being left free to work out the details for themselves, ample time being given for that purpose. The law gave five years, and that was enlarged, by the Interstate Commerce Commission, as authorized by law, two years, and subsequently seven months, making seven years and seven months in all.

The diligence of counsel has called our attention to changes made in the bill in the course of its passage, and to the debates in the Senate on the report of its committee. 24 Cong. Rec., pt. 2, pp. 1246, 1273 et seq. These demonstrate that the difficulty as to interchangeability was fully in the mind of Congress, and was assumed to be met by the language which was used. The essential degree of uniformity was secured by providing that the couplings must couple automatically by impact without the necessity of men going between the ends of the cars.

In the present case the couplings would not work together; Johnson was obliged to go between the cars; and the law was not complied with.

March 2, 1903 (32 Stat. at L. 943, chap. 976),* an act in amendment of the act of 1893 was approved, which provided, among other things, that the provisions and requirements of the former act "shall be held to apply to common carriers by railroads in the territories and the district of Columbia, and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type;" and "shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce."

This act was to take effect September 1st, 1903, and nothing in it was to be held or construed to relieve any common carrier "from any of the provisions, powers, duties, liabilities, or requirements" of the act of 1893, all of which should apply except as specifically amended.

As we have no doubt of the meaning of the prior law, the subsequent legislation cannot be regarded as intended to operate to destroy it. Indeed, the latter act is affirmative and declaratory; and, in effect, only construed and applied the former act. *Bailey v. Clark*, 21 Wall. 284, 22 L. Ed. 651; *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724; *Cope v. Cope*, 137 U. S. 682, 34 L. Ed. 832, 11 Sup. Ct. Rep. 222; *Wetmore v. Markoe*, 195, U. S. —, post. p. 172, 25 Sup. Ct.

*U. S. Comp. St. Supp. 1903, p. 367.

Rep. 172. This legislative recognition of the scope of the prior law fortifies, and does not weaken, the conclusion at which we have arrived.

Another ground on which the decision of the circuit court of appeals was rested remains to be noticed. That court held by a majority that, as the dining car was empty and had not actually entered upon its trip, it was not used in moving interstate traffic, and hence was not within the act. The dining car had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purpose. On the day of the accident the east-bound train was so late that it was found that the car could not reach Ogden in time to return on the next westbound train according to intention, and it was therefore dropped off at Promontory, to be picked up by that train as it came along that evening.

The presumption is that it was stocked for the return; and as it was not a new car, or a car just from the repair shop, on its way to its field of labor, it was not "an empty," as that term is sometimes used. Besides, whether cars are empty or loaded, the danger to employees is practically the same, and we agree with the observation of District Judge Shiras, in *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed. 867, that "it cannot be true that on the eastern trip the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty."

Counsel urges that the character of the dining car at the time and place of the injury was local only, and could not be changed until the car was actually engaged in interstate movement, or being put into a train for such use, and *Cole v. Errol*, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. Rep. 475, is cited as supporting that contention. In *Coe v. Errol* it was held that certain logs cut in New Hampshire, and hauled to a river in order that they might be transported to Maine, were subject to taxation in the former state before transportation had begun.

The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different states, renders this and like cases inapplicable.

Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law.

Finally, it is argued that Johnson was guilty of such contributory negligence as to defeat recovery, and that, therefore, the judgment should be affirmed. But the circuit court

Illinois Cent. R. Co. v. Head

of appeals did not consider this question, nor apparently did the circuit court, and we do not feel constrained to inquire whether it could have been open under § 8, or, if so, whether it should have been left to the jury, under proper instructions.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause remanded to that court with instructions to set aside the verdict, and award a new trial.

ILLINOIS CENT. R. CO. v. HEAD.

(Court of Appeals of Kentucky, Feb. 9, 1905.)

[84 S. W. Rep. 751.]

Infants—Title of Action.

Where an action is for damages to an infant, it should be brought in his name by his statutory guardian.

Carriers of Passengers—Delay in Furnishing Transportation—Breach of Contract—Damages.*

Where a railroad company merely contracts to furnish transportation, without being notified what the trip is for, the measure of damages for its negligent delay in furnishing it is merely compensation for the loss of time and for any expenses incurred during the delay.

Appeal from Circuit Court, Muhlenberg County.

"To be officially reported."

Action by Fred Head, guardian, against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Jonson & Wickliffe, Pirtle & Trabue, and J. M. Dickinson, for appellant.

R. Y. Thomas, Jr., for appellee.

HOBSON, C. J. George Head died on April 28, 1901, at Greenville, Ky. His son Rupert Head was then in St. Louis. His son Fred Head, who was at home, on the 29th went to the uptown telegraph office to telephone out to the railroad station and ask what the fare from St. Louis to Greenville was, and was told that it was \$8. By an arrangement made with the agent through one Jarvis, he paid Jarvis the \$8; and, Jarvis having told the agent that the money was deposited with him, the agent wired a ticket to St. Louis for Rupert Head, his telegram being as follows:

"Greenville, 4/29. Ticket Agent, St. Louis, Mo.: Please furnish R. Head ticket St. Louis to Greenville, Kentucky, notify when done and I will remit to cover. T. L. Patterson."

*As to what damages may be recovered for failure to carry, or delay in carrying a passenger, see foot-note appended to Schmidt v. Cleveland, C. C. & St. L. Ry. Co. (Ky.), 12 R. R. R. 149, 35 Am. & Eng. R. Cas., N. S., 149; foot-note appended to Chiles v. Southern Ry. (S. Car.), 12 R. R. R. 750, 35 Am. & Eng. R. Cas., N. S., 750.

Illinois Cent. R. Co. v. Head

Thereupon Fred Head sent from the telegraph office where he was uptown the following message:

"4/29. 1901. Dated, Greenville, Ky. To R. Head, 840 Chato Ave.: Call Illinois Central for ticket arrive here eleven to-morrow sure. Fred Head."

The purpose of the arrangement was to get Rupert Head to Greenville in time for his father's funeral the next day, the understanding being that the connections were such that he would reach there by 11 a. m.

Patterson's telegram went to the agent at the Union Station. Rupert Head, on getting his telegram, went to the city office of the railroad company, where he was told by the person to whom he applied, who was selling tickets, that that was the place for his ticket to be, but it had not come. This was said after he had showed the agent his telegram. He went back several times, but was each time told the ticket had not come, and, after two days' delay, went down to the Union Station, with the intention of trying to come home in some other way, and found his ticket there. He reached home after his father was buried, and this action was filed to recover damages for the delay. Judgment was rendered against the company in the sum of \$200, and it appeals.

The suit was brought in the name of "Fred Head, statutory guardian of Rupert Head, suing for the use and benefit of said Rupert Head." The guardian had sustained no loss by the delay of Rupert Head. The cause of action was in the infant, and should have been brought in his name by Fred Head as his statutory guardian. This seems to be what the pleader was aiming to do, and the petition may be amended so as to make Rupert Head party plaintiff, suing by Fred Head as his statutory guardian.

The court gave the jury the following instruction as to the measure of damages: "The measure of damages, if any, is such a sum of money as will reasonably and fairly compensate plaintiff for any mental suffering, if any, caused to him by the negligent failure, if any, of the defendant to deliver the ticket aforesaid, if it did fail, and the mental suffering, if any, caused to him by the failure to be present at the funeral of his father." In giving this instruction the court followed the rule announced by this court in the telegraph cases where there is negligence in delivering social telegrams announcing the death or the sickness of a relative, and the like. But this rule is never followed except where the telegram, on its face, shows its nature, and thereby apprises the company of its importance. It will be observed that in the case at bar there is nothing of this character. The contract which was made through Jarvis by the railroad agent with Fred Head was simply a contract to furnish transportation from St. Louis to Greenville. The ticket agent at Greenville had no authority, presumably, to make a contract

Seaboard Air Line Ry. v. Harris

to bring Rupert Head to Greenville at any specified time, and there is nothing in the record warranting the conclusion that he undertook to do so. The evidence present simply a case where the railroad company agreed to furnish transportation, and failed to do so promptly, if Rupert Head was not guilty of contributory negligence in going to the wrong place for his ticket, and of this the jury must judge. But if the railroad company was negligent in furnishing the transportation, the measure of damages is simply a reasonable compensation for the time lost by Rupert Head, and any expenses he incurred by reason thereof. *Robinson v. Western Union Telegraph Company*, 68 S. W. 656, 57 L. R. A. 611. In 3 *Sutherland on Damages*, § 936, the rule is thus stated: "If the journey is delayed there will be a loss of time, and the passenger is entitled to compensation for it, and also for any increased expense reasonably incurred during the delay, or to procure other conveyance, when necessary." The same rule is stated in 2 *Sedgwick on Damages*, § 863, and then this is added: "In *Hamlin v. Great Northern Railway Company*, 1 H. & N. 408, the plaintiff was delayed on the defendant's road so that he could not get from G. to H. in the evening, as he had intended to do. He therefore remained for the night at G., and went to H. the next morning. It was held that he could not recover for a failure to keep appointments with customers at H. He could only recover the expense of his night's lodging." If Rupert Head had, by reason of the delay, lost an option worth \$100, or had reached Greenville too late to be married, such damages could not be recovered for here. The damages would be too remote, and not the natural or proximate result of the defendant's act. The same rule must apply to his failure to reach his father's funeral.

Judgment reversed and cause remanded for a new trial.

SEABOARD AIR LINE RY. v. HARRIS.

(Supreme Court of Georgia, Jan. 27, 1905.)

[49 S. E. Rep. 703.]

Carriers—Delivery of Baggage—Delay—Damages.*

Where a traveling salesman, whose compensation is based on commissions on such orders secured by him as his employer approves, shipped his trunks of samples over the line of a common carrier, and they were unreasonably delayed, he cannot, in a suit for breach of the contract to convey, recover as damages for such delay the profits from orders which, tested by past experience, he would have secured during the period he was without his trunks. Such damages are too remote and speculative, grow out of an enterprise collateral to the contract to

*See foot-note appended to *Louisville & C. Packet Co. v. Bottorff* (Ky.), 13 R. R. R. 263, 36 Am. & Eng. R. Cas., N. S., 263; *Ryland & Rankin v. Chesapeake & O. Ry. Co.* (W. Va.), 13 R. R. R. 279, 36 Am. & Eng. R. Cas., N. S., 279.

State ex rel. *Ellis v. Atlantic Coast Line R. Co*

ship the trunks, and are not such as the parties contemplated when the contract was made as the natural result of its breach. Civ. Code, 1895, § 3798; *Georgia Railroad v. Hayden*, 71 Ga. 518, 51 Am. Rep. 274. (Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by J. A. Harris against the Seaboard Air Line Railway. Judgment for plaintiff. Defendant brings error. Reversed.

E. A. Hawkins, for plaintiff in error.

J. H. Lumpkin, for defendant in error.

SIMMONS, C. J. Judgment reversed. All the Justices concur.

STATE ex rel. *ELLIS*, Atty. Gen., et al. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of Florida, Oct. 19, 1904.)

[37 So. Rep. 657.]

Railroad Commission—Rates—Enforcement—Mandamus.*

When, upon a trial of an issue of the reasonableness of a specific rate fixed by the Railroad Commission, the railroad company fails to show that this rate is materially less than the one voluntarily charged, or any fact from which it can be said that the rate is unreasonable, mandamus will issue to enforce the rate.

Same—Same—Province of Courts.†

When a specific rate is fixed by the Railroad Commission, the courts are not concerned whether such rate may be unnecessary or merely speculative.

Same—Same—Unreasonableness—Insufficiency of Evidence—Enforcement—Mandamus.

When, upon the trial of an issue, whether the enforcement of a specific rate, when taken in connection with the other schedule of rates enforced by the Railroad Commission, would result in depriving a railroad company of its property without due process of law and of the equal protection of law, it is shown that the domestic business alone produces a net earning of 3 per cent. on the total valuation of the road in the state, after charging against such earning the whole amount of the taxes, and there is no proper showing whereby the court can determine what proportion of the total value of the property should be assigned to local business, and the interstate and foreign business is large, mandamus will issue to enforce the rate.

(Syllabus by the Court.)

In Banc. Mandamus by the state, on the relation of W.

*See note, 8 Am. & Eng. R. Cas., N. S., 615; *State v. Jacksonville Term. Co.* (Fla.), 16 Am. & Eng. R. Cas., N. S., 727.

†See *Morgan's Louisiana & T. R. & S. S. Co. v. Railroad Commission* (La.), 6 R. R. R. 122, 29 Am. & Eng. R. Cas., N. S., 122 (jurisdiction of supreme court of Louisiana to dispose of matters in dispute between railroads and state railroad commission); *Railroad Commission of Texas v. Weld* (Tex.), 7 R. R. R. 572, 30 Am. & Eng. R. Cas., N. S., 572 (jurisdiction to review acts of commission establishing rates, under Tex. Rev. Sta. 1895, arts. 4565, 4566); *Chicago, etc., Ry. Co. v. Louisville, etc., R. Co.* (Ky.), 19 Am. & Eng. R. Cas., N. S., 688; *Louisville & N. R. Co. v. Commonwealth* (Ky.), 13 Am. & Eng. R. Cas., N. S., 125.

State ex rel. Ellis v. Atlantic Coast Line R. Co

H. Ellis, Attorney General, and another, against the Atlantic Coast Line Railroad Company. Peremptory writ awarded.

W. H. Ellis, Atty. Gen., and J. M. Barrs, for plaintiff.
Jno. E. Hartridge, for respondent.

COCKRELL, J. This cause is before us for final determination upon the proof taken on the issues raised by the amended return of the respondent filed by leave of this court July 26, 1904. A motion to quash this return was overruled upon respondent's contention that the return presented the two issues: First, that the phosphate rate here sought to be enforced was in and of itself unreasonable; and, second, that taken in connection with the other schedule of freight rates enforced by the State Railroad Commission in Florida, its enforcement would result in depriving the respondent of its property without due process of law and of the equal protection of the law, contrary to the guaranties of the Constitution of the United States and the amendments thereof.

Has the respondent, by its proof, overcome the presumptions of reasonableness which the statutes of Florida cast around the findings of its Railroad Commission? We answer unhesitatingly that it has failed to sustain the return in both particulars.

Without attempting to set out what amount of proof is necessary to overcome such presumptions, we shall content ourselves with pointing out a few only of the lapses in the proof offered us. There is a total lack of positive proof that the commission rate is materially less than that now charged. The company proves merely that its books do not show that any local phosphate has been carried by it, but does not show what rate it charges on the interstate shipments of phosphate. There is some showing of the expensiveness of handling phosphate for foreign shipment, much of which would not enter into the local or interstate business should such be carried; but nothing is shown from which this court can say that the rate fixed by the commission is unreasonable. The evidence offered might tend to show that the rate is unnecessary, or that it is speculative, but such questions the court is not called upon to decide. Undoubtedly, if phosphate be carried at the rate fixed by the commission, there will be some increase in the gross earnings, and, when tried, it may be found profitable.

The other issue the respondent has likewise failed to meet. Taking the figures from the brief filed by the respondent, we find that the local business alone produces a net earning of at least 3 per cent. on the total value of the road in Florida, charging against such income the whole of the taxes. While a state is not permitted to offset local business against interstate business, and to justify low local rates by reason of the profitableness of the latter, yet the interstate and foreign business may and should be considered in determining the

proportion of the value of the property of the company assignable to local business. There is no proper showing of the interstate and foreign business, so that we may determine on what fraction of the whole value of the property in Florida the company might be entitled to earn an income from local business. There is, however, a showing that the interstate and foreign business is large, and on a proper showing and a proper proportioning of the service between domestic and foreign business this percentage of net income would be largely increased. Under the scheme of distribution of the earnings of the whole road between the several states through which it runs, a ton of Florida oranges or early vegetables is allowed the same credit as a ton of coal in Virginia, and no more.

We have examined with care all the rate cases decided by the Supreme Court of the United States, and see nothing therein to conflict with the views expressed above.

Under the burden of proof cast by the law upon the respondent we find that the rate in question is not unreasonable, and further find that said rate, taken in connection with the other rates prescribed by the Railroad Commission, does not deprive the respondent of his property without due process of law, nor does it deprive the respondent of the equal protection of the law within the inhibitions of the federal Constitution.

MR. JUSTICE CARTER, who has been called away by reason of illness in his family, took part in the discussion of this case, and stated his concurrence with the conclusions announced.

The peremptory writ is awarded.

TAYLOR, C. J., and SHACKLEFORD, HOCKER, and WHITFIELD, JJ., concur. CARTER, J., absent.

CHESAPEAKE & O. R. CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky, Jan. 24, 1905.)

[84 S. W. Rep. 566.]

Duty to Furnish Separate Coaches for White and Colored Passengers—Indictment—Sufficiency.

Under Ky. St. 1903, § 795, providing that railroads doing business in the state shall furnish separate coaches for white and colored passengers; section 796, declaring that no discrimination shall be made in the quality of such coaches; and section 797, providing that the failure of a railroad to comply with such provisions shall be deemed a misdemeanor—an indictment substantially following the words of the statute, and alleging that defendant willfully and unlawfully failed to furnish such coaches on a particular occasion, sufficiently charges the commission of a public offense.

Same—Failure to Comply with Statute—Excuse—Unavoidable Accident.

On a prosecution of a railroad under Ky. St. 1903, §§ 795-797, for failure to furnish separate coaches for white and colored passengers, where defendant alleged that such failure was caused by an accident

Chesapeake & O. R. Co. v. Commonwealth

preventing the attachment of a separate coach to the train, an instruction that, if the jury believed that the operation of a train without a separate coach, marked and provided as required by law, was caused by an unavoidable accident, which defendant, by ordinary prudence, could not have guarded against, they should find defendant not guilty, should have been given.

Appeal from Circuit Court, Shelby County.

"To be officially reported."

The Chesapeake & Ohio Railroad Company was convicted of failure to furnish separate coaches for white and colored persons, and it appeals. **Reversed.**

Willis & Todd, for appellant.

N. B. Hays and L. Mix, for appellee.

SETTLE, J. The appellant, Chesapeake & Ohio Railroad Company, was tried, convicted, and fined \$500 in the Shelby circuit court, under an indictment charging it with having willfully and unlawfully failed to furnish for the transportation of white and colored passengers on its line of railroad a separate coach, each compartment divided by a good and substantial wooden partition with a door therein, and each bearing in some conspicuous place, in plain letters, appropriate words indicating the race for which it was set apart. Appellant asks a reversal of the judgment because of alleged error upon the part of the lower court, first, in overruling its motion in arrest of judgment; second, in failing to properly instruct the jury and refusing proper instructions offered by appellant.

Section 795, Ky. St. 1903, provides: "Any railroad company or corporation, person or persons, running or otherwise operating railroad cars or coaches, by steam or otherwise, on any railroad line, or track within this state, and all railroad companies, person or persons, doing business in this state whether upon lines of railroad owned in whole or in part, or leased by them, * * * are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart." Section 796 declares that no discrimination shall be made in the quality, convenience, or accommodations of the coaches set apart for white and colored passengers, and section 797 provides "that any railroad company or companies, that shall fail, refuse or neglect to comply with the provisions of sections 795, 796, shall be deemed guilty of a misdemeanor, and upon indictment or conviction thereof, shall be fined not less than \$500, nor more than \$1,500, for each offense." The evidence contained in the record conclusively shows that appellant did, on the 19th

day of February, 1903, operate a passenger train upon and over its railroad in Shelby county, which did not have attached or belonging to it a separate coach for the transportation of white and colored passengers partitioned and otherwise equipped as required by the statute. Indeed, no denial of this fact is made by counsel for appellant, but it is contended that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court, and, further, that the appellant on the day in question was prevented by unavoidable accident and casualty from having with and as a part of its train a separate coach for the use of white and colored passengers as required by the statute, and as was its custom.

We are of opinion that the first contention is without merit. The indictment in large measure follows the words of the statute in describing, and in fairly appropriate language sets forth with sufficient particularity, the acts constituting the offense, and that it was committed in Shelby county, on the 19th of February, 1903, and before the finding of the indictment. We think the language of the indictment was sufficiently explicit to apprise appellant of the offense with which it was charged, and to bar a subsequent prosecution against it for the same offense. The trial court, therefore, did not err in overruling the motion in arrest of judgment.

Appellant's second contention presents a more serious question, and one upon which this court has never passed. It appears from the record that appellant's passenger train for the running of which without the separate coach it was indicted in this case was known as "No. 22," and that it was scheduled to leave Louisville daily at 8:30 a. m., and on February 19, 1903, it left Louisville at 8:30 a. m., as usual, but for the first time was carried through to Lexington without the separate coach. It also appears that another of appellant's trains, known as "No. 25," left Ashland daily at 1:20 p. m. for Louisville, and arrived at the latter city at 8 p. m. of the same day, and that this train was always provided with a separate coach for the transportation of white and colored passengers, equipped as required by the statute, which, after its arrival in Louisville, was transferred to and connected with train No. 22, due to leave Louisville at 8:30 a. m., and was used by the latter train daily. It further appears that train No. 25, instead of leaving Ashland February 18, 1903, at 1:20 p. m., its schedule time, which would have enabled it to reach Louisville at 8 p. m. of that day, was so delayed by a landslide east of Ashland that it did not leave that city until 12:14 a. m. of February 19th, which caused it to arrive at Louisville 13 hours and 31 minutes behind its schedule time, or at 9:31 a. m. February 19, 1903, about one hour after train No. 22 left that city on its schedule time. In other words, the two trains met near Shelbyville. On account of the delay caused train No. 25 beyond

Ashland, train No. 22 was on February 19, 1903, deprived of the use of the separate coach it was accustomed to receive from train No. 25 before leaving Louisville, and its run that day from Louisville east was consequently made without it, as stated. The evidence for the commonwealth established the fact that on no other day than February 19th was train No. 22 run through Shelby county without a separate coach equipped and lettered as required by the statute, and the further fact that there were no colored persons on the train that day. It was shown, too, by appellant's testimony, that it had and used between Louisville and Ashland three separate coaches equipped and lettered as required by the statute for the transportation of white and colored passengers, which had theretofore supplied the wants and convenience of the traveling public, and that neither delay nor accident had, previously to February 19, 1903, prevented train No. 25 from arriving at Louisville in ample time to attach the separate coach to train No. 22 before the arrival of the schedule time for its departure from that city.

Did the foregoing facts and circumstances excuse the failure of appellant to have attached to the passenger train in question a separate coach for the use of white and colored passengers on the occasion named in the indictment? In considering this question it must be borne in mind that appellant was required by statute to run its train, as well as to provide it with the separate coach. Besides, it was and is a common carrier, intrusted by the federal government with the duty of carrying the mails without unreasonable delay. Its duty to the public requires regularity and promptness in the running of its trains, and it will hardly be contended that delay of the other train in reaching Louisville should have prevented this one from leaving that city according to its schedule time. It is, however, insisted for the commonwealth that appellant is amenable to the punishment prescribed by the statute because of its failure to keep at Louisville an extra separate coach, equipped as required by the statute, for the use of its white and colored passengers, as it might have done, to guard against such emergencies as the one that occurred on February 19, 1903. It is true such a precaution might have been taken, but in view of the fact that no occasion had theretofore arisen for an extra separate coach of the character indicated, and of the further fact that there was an interval or margin of 12½ hours between the time scheduled for the arrival of the train bringing the separate coach and the time of the departure of the other, appellant's contention that its employees charged with the duty of operating its trains could not, under the circumstances, have anticipated and guarded against the conditions that compelled the running of the train in question on February 19th without the separate coach, is not without force. At any rate, it was for the jury to say whether, not-

withstanding the accident which delayed train No. 25, appellant, by the exercise of reasonable diligence, could have secured for train No. 22 a separate coach for white and colored passengers equipped as required by the statute. It is said by Bishop in his work on Statutory Crimes, § 132: "Again, a statute will not generally make an act criminal, however broad may be its language, unless the offender's intent concurred with his act, because the common law requires such concurrence to constitute a crime. A case of overwhelming necessity, or of honest mistake of facts will thus be excepted out of a general statutory prohibition. * * *". It is true the statute supra declares "that any railroad company or companies that shall fail, refuse or neglect to comply with the provisions of sections 795 and 796 shall be guilty of a misdemeanor," etc. The words "fail," "refuse," "neglect" are used interchangeably, and as meaning something more than an unavoidable or accidental violation of the statute. We are aware that it has been held by this court, and by other courts of last resort, that acts not done with compulsion or under necessity, if forbidden by statute, although not *malum in se*, are punishable as provided in the statute, notwithstanding they might have been done without willful or malicious intent. *Wayman v. Commonwealth*, 14 Bush, 466; *Jellico Coal Co. v. Commonwealth*, 96 Ky. 373, 29 S. W. 26. In *Commonwealth v. Bull*, 13 Bush, 666, it is said: "When the Legislature has declared that a given act shall be deemed unlawful, the person voluntarily doing said act will be charged with a criminal intent." But the above rule applies to unlawful acts voluntarily (and, in that sense, intentionally) done, and never to such as are done under compulsion or necessity. The appellant, on the morning of the 19th of February, 1903, in sending out its train, seems to have acted from both necessity and compulsion. By unavoidable accident or casualty the train from which train No. 22 was accustomed to get the separate coach in time for its departure from Louisville on the morning of each day was delayed beyond the hour for its departure from Louisville of that train, thereby leaving appellant to the choice of not sending out its train on the morning of the 19th of February, and not transporting its passengers or the mail in violation of law, or sending out the train without the separate coach for colored passengers, as the statute required. In *Stephens' Digest of Criminal Law*, art. 32, it is said: "An act which would otherwise be a crime may be excused if the person accused can show that it was done only in order to avoid the consequences which could not otherwise be avoided, and which, had they failed, would inflict upon him, or upon others whom he was bound to protect, inevitable or unavoidable evil; that no more was done than was reasonably necessary for that purpose; and that the evil inflicted by it was not disproportionate to the evil avoided." *Ency. of Law and Procedure*, vol. 12, p. 160. We

Illinois Cent. R. Co. v. Smith

think the appellant, upon the facts of this case, was entitled to the benefit of the rule above quoted, and that the trial judge erred in refusing to give to the jury the law as asked by appellant's counsel, though improperly expressed in the instructions offered. That is, the court should have instructed the jury that if they believed from the evidence that the operation of appellant's train February 19, 1903, without a separate coach or compartment car marked and provided with notices as set out in instruction No. 1, was caused by an unavoidable accident or casualty, which appellant by ordinary prudence could not reasonably have anticipated or guarded against, they should find the appellant not guilty.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial and further proceedings consistent with this opinion.

ILLINOIS CENT. R. CO. v. SMITH.

(Supreme Court of Mississippi, Jan. 9, 1905.)

[37 So. Rep. 643.]

Duty to Carry Passengers—Persons under Incapacity—Only Apparent Incapacity—Knowledge of Carrier.*

A carrier may deny transportation to a person who, on account of physical or mental disability, is unable to care for himself, or liable to require extra attention from the carrier or the passengers; but where a person seemingly disabled is in fact able to travel alone without requiring extra care or attention, and this fact is known to the carrier, it is bound to carry him.

Duty to Carry Blind Persons.

A carrier is not liable for excluding a blind person from its trains, unless the agent to whom application for transportation is made knows, or has reasonable grounds to believe, that the person demanding transportation, although blind, is fit to travel, in which case, if he arbitrarily persists in refusing to sell him a ticket, the carrier is liable both for compensatory and punitive damages.

Same.

It is the duty of the agent of a carrier to whom a blind person applies for transportation to listen to explanations made by him of his experience and capacity to travel alone, and to judge of his competency in the light of the facts then made known to him.

Same—Question of Fact.

The reasonableness or unreasonableness of the refusal of the agent of a carrier to sell a ticket to a blind person, who offers an explanation of his ability to travel alone, is a question for the jury.

Appeal from Circuit Court, Attalla County; W. F. Stevens, Judge.

Action by J. H. Smith, by his next friend, against the Illinois Central Railroad Company. From a judgment of plaintiff, defendant appeals. Reversed.

Mayes & Longstreet, for appellant.

Teat & Teat, for appellee

*Owens v. Macon & B. R. Co. (Ga.), 9 R. R. R. 751, 32 Am. & Eng. R. Cas., N. S., 751.

Illinois Cent. R. Co. v. Smith

TRULY, J. Appellee, a minor, 18 years of age, desiring to travel from Winona to Durant, in this state, applied to the agent of appellant to purchase a ticket, tendering proper fare. This was refused him on the ground that he was blind and unaccompanied by an assistant, and, under an existing rule of the railroad company, was not entitled to transportation. Appellee claimed that he was an experienced traveler, able to care for himself, and needing no assistance. He offered to produce his order book to show that he was in the habit of traveling and booking orders for goods, but the agent persisted in his refusal. Thereby appellee was forced to change his route and travel over another railway. He brought suit against appellant, claiming both actual and punitive damages. The actual damage proven was small. The jury awarded punitive damages under the instructions of the court, and the Illinois Central Railroad Company appealed.

Several instructions were granted appellee, embodying the same general idea. The first and fifth will sufficiently illustrate the main propositions presented for consideration. They are as follows:

No. 1. "The court instructs the jury that if they believe that the plaintiff, J. H. Smith, on the 19th day of January, 1903, applied to the defendant's ticket agent at Winona, Miss., at the proper time and place and in the proper manner, for the purchase of a railroad ticket from Winona, Miss., to Durant, Miss., then and there tendering the requisite amount of cash fare, as alleged in the plaintiff's declaration, and that said agent then and there refused to sell plaintiff a ticket as requested, for no other reason than that the plaintiff was blind, and that the plaintiff, although blind, was in fact otherwise qualified to travel, the defendant is guilty of a wrong, and they should find for the plaintiff, and assess his damages at such sum as they may think proper from all the evidence, not exceeding the sum sued for, to wit, \$1,500."

No. 5. "The court instructs the jury, for the plaintiff, that a common carrier of passengers cannot refuse to carry a person, otherwise qualified, upon the sole ground that he is blind; and, if such common carrier willfully refuses so to do, they are liable for punitive damages."

The general rule in force in this state is that which is embodied in the text, and accurately stated in 5 Am. & Eng. Ency. of Law, p. 538, note 4: "While persons who are ill have a right to enter and travel upon the conveyances of a common carrier of passengers, nevertheless the carrier is not bound to accept as a passenger, without an attendant, one who, because of physical or mental disability, is unable to take care of himself; but should the carrier voluntarily accept as a passenger such a person without an attendant, his inability to care for himself, rendering special care and assistance necessary, being apparent or made known at the time of his application for carriage to the servants of the

Illinois Cent. R. Co v. Smith

carrier, the latter will be held responsible if such care and assistance are not afforded." See, also, *Weightman v. Railroad*, 70 Miss. 563, 12 South. 586, 19 L. R. A. 671, 35 Am. Rep. 660; *Sevier v. Railroad*, 61 Miss. 8, 48 Am. Rep. 74; *Railroad v. Statham*, 42 Miss. 607, 97 Am. Dec. 478. This rule recognizes the authority of the carrier to exclude and deny transportation to any person desiring passage who, on account of physical or mental disability, is unable to care for himself, or liable on account of that incapacity to become a burden upon his fellow passengers or to require extra attention from the carrier. But inasmuch as experience has shown that many persons seemingly incapacitated by physical disability are in truth perfectly competent to travel alone, the courts, in the interest of the traveling public, have modified the rigor and limited the otherwise universal application of the rule by providing that any person desiring transportation shall be entitled to passage upon payment of fare, notwithstanding his seeming incapacity, if, as a matter of fact, he be competent to travel alone without requiring other care than that which the law requires the carrier to bestow upon all its passengers alike; and, if this proof of capacity be in any manner brought to the knowledge of the agent of the carrier, the carrier is liable in damages for any exclusion from its trains. This is the evident meaning of the opinion of this court in the case of *Zachery v. Railroad*, 75 Miss. 751, 23 South. 435, 41 L. R. A. 385, 65 Am. St. Rep. 617, where, through *Whitfield Justice*, it is said: "Each case must depend on its own facts, and the reasonableness of the refusal to sell a blind person a ticket must on principle depend, not on a universal, arbitrary, and indiscriminating rule like this one, but on the capacity to travel, unaccompanied, of the particular blind person, as shown by the proof on that point in his case." Primarily the affliction of blindness unfits every person for safe travel by railway, if unaccompanied. No blind person without previous experience could possibly accommodate himself to the many exigencies incident to travel by railroad, or guard himself against peril in boarding and alighting from trains; changing from one train to another, or threading his way in safety across the railway tracks at crowded stations. Hence the rule which provides that every blind person is presumed to be, in the absence of proof of experience, unfit to travel alone, is not unreasonable. Nor do we consider such a regulation a hardship upon the persons afflicted with blindness or other disabling physical infirmity. It is rather a safe guard thrown around them for their own protection. Therefore, when a blind person applies to purchase a ticket, being himself unknown to the agent, and that ticket is refused, the carrier is not liable by this act alone to be mulcted in damages; but, as before indicated, if the agent of the carrier knows of his personal knowledge of the competency to travel of the particular per-

son, or if the fact of such ability is made known to him in any manner, and he still persists wantonly and arbitrarily in his refusal to sell the person desiring passage a ticket, the carrier may be made to respond in damages for his oppressive act. And it is the duty of the agent of the carrier to listen to the explanation made by the person desiring to purchase a ticket, and judge of his competency in light of the facts then made known to him, and the question of the reasonableness or unreasonableness of his refusal is one of fact to be submitted to the jury, should litigation arise; and if it should appear that such refusal was reasonable under the circumstances, as they then existed to the knowledge of the agent, the carrier would not be liable to damages; but, as in every other case, if it should develop that his action was caused by wantonness or a desire to arbitrarily injure, humiliate, or oppress the proposed passenger by such action, the carrier would be responsible, and would be liable both to compensatory and punitive damages. In the instant case, it will be observed that the first instruction set out above told the jury that if they believed the agent refused to sell plaintiff a ticket on the sole ground that he was blind, and that if they further believed that the plaintiff, "although blind, was in fact otherwise qualified to travel," then, these two facts being established, the railroad was convicted of a wrong, and the jury was authorized to find for plaintiff, and to assess his damages "at such sum as they may think proper from all the evidence, not exceeding the sum sued for." An inspection of the record shows that there was no dispute as to the fact that the agent's refusal to sell appellee a ticket was "for no other reason than that the plaintiff was blind"; so the first instruction in effect directed the jury to inflict such damages as they thought proper, from the evidence, upon the railroad company, if they, the jury, believed that the plaintiff, although blind, "was otherwise qualified to travel."

The fifth instruction was to the effect that if a common carrier willfully refused to carry a person otherwise qualified, on the sole ground that he is blind, it was "liable for punitive damages." Both instructions are erroneous for want of the same limitation, i. e., that the agent of the railroad knew, or had reasonable grounds to believe, or from circumstances within his knowledge ought to have known, that the person demanding transportation, although blind, was otherwise qualified to travel. The infliction of punitive damages is authorized where an employee of a carrier knowingly and wantonly refuses to do some act which his duty requires that he shall perform, and is not properly predicable of a fact unless proof of its existence is brought to the knowledge of the acting party. In this case, under the general rule hereinbefore announced, when the appellee demanded the right to purchase a ticket and become a passenger, while unattended by an assistant, the agent was acting within the

Fisher v. Boston & M. R. Co

scope of a reasonable regulation, designed for the protection of all persons suffering from disabling physical infirmities, when he refused to sell the ticket, and the fact, if fact it was, that appellee was in truth qualified to travel alone, unless brought to the knowledge of the agent, placed no additional liability upon the appellant. No matter how thoroughly competent appellee may have been to travel unattended, or how extensive his traveling experience, unless the agent either knew, or from circumstances of which he had notice ought to have known, of this competency and previous experience, the mere existence of these facts could not in any way impute wrongfulness to an act committed in ignorance of them. If the agent of a railroad company refuses wantonly and arbitrarily to sell a ticket to a blind man, knowing at the time that such person is a thoroughly competent traveler, then the carrier would be liable to punitive damages, and the mere fact of blindness, and the apparent existence of a disability which the agent knew was only apparent and not actual, would not excuse or justify the oppressive act. But the two instructions under review ignore this vital element, and authorize the jury to inflict punitive damages upon the appellant for the commission of an act by its employee when, so far as the instructions show, the employee may not have known of the existence of the very fact which rendered his action in refusing the ticket wrong, if wrong it was:

As the case must be remanded for a new trial, we refrain from any comment upon the testimony as to whether the evidence proved that the appellee was competent to travel alone, or whether the facts made known to the agent of the appellant were such as should have led him to infer such competency on the part of appellee.

Reversed, and remanded for a new trial.

FISHER v. BOSTON & M. R. CO.

(Supreme Judicial Court of Maine, Dec. 12, 1904.)

[59 Atl. Rep. 532.]

Common Carrier—Termination of Liability—Duty as Forwarder.

When a common carrier has transported goods over its own lines to its terminus, or to the point of intersection with a designated connecting carrier, and is thereby unable to deliver them to the connecting carrier, without any fault upon its part, its duty and liability as a common carrier cease; but the duty still rests upon the carrier, as a forwarder, to exercise reasonable care and diligence to prevent unnecessary loss to the goods, and to save unnecessary cost to the owner in storage or transportation. Such forwarder should exercise the same degree of care to prevent loss or unnecessary expense that a prudent owner would have in the same situation.

Same—Same—Same—Duty to Notify Consignee.

It is a general rule that where the carrier is unable to deliver the goods to the next designated carrier, and has an opportunity to do so,

Fisher v. Boston & M. R. Co

it is his duty to at once notify the shipper or consignee, and failure to give such notice will render him liable for any loss or injury resulting therefrom.

Right of Carrier as Forwarder to Select Another Route.*

Where the goods can be properly cared for and held until the shipper can be communicated with, the carrier will not be justified in selecting another route without notice to him and instructions from him. And this is true even where there is a stipulation in the contract of shipment to the effect that every carrier shall have the right, in case of necessity, to forward the goods by any railroad or route between the place of shipment and the place of designation.

(Official.)

Report from Supreme Judicial court, Aroostook County.

Action by Thomas A. Fisher against the Boston & Maine Railroad Company. Case reported. Judgment for plaintiff.

Action on the case to recover the increased cost of transportation which the plaintiff was obliged to pay on three cars of potatoes shipped by him from Fort Fairfield, Me., to Philadelphia, caused by the defendant forwarding the potatoes from Boston by a route other than that designated by the plaintiff. In addition to the general issue, the defendant filed a brief statement alleging:

"(1) That, under clause 2 of the contract of shipment made by the plaintiff with the defendant through the Bangor & Aroostook Railroad Company, the initial carrier, and the agent in that behalf of the defendant, the defendant was specially licensed and authorized by the plaintiff, in case of necessity, to forward the potatoes described in the plaintiff's writ by any railroad or route between the point of shipment and the point to which the rate was given, to wit, Philadelphia, and the defendant was not bound to carry said potatoes by any particular train or route, or in any time for any particular market, otherwise than with as reasonable dispatch as the general business of the defendant would permit. And the defendant says that on account of strikes and labor troubles, involving freight handlers and teamsters, in said Boston, at the time said potatoes should have been delivered in the due course of business to said Boston & Philadelphia Steamship Company, it was impossible for the defendant to deliver said potatoes to said steamship company.

"(2) That it was also impossible for said steamship company to receive and handle and forward same to Philadelphia. And it was also impossible for the defendant or said steamship company to form any idea of the duration of said strikes and labor troubles, or to form any idea as to when the same could be forwarded by said steamship company to Philadelphia.

"(3) That it was further impossible for the defendant, with its large amount of business, to communicate at that time with the plaintiff.

*For authorities on subject of selection, see monograph appended to *Louisville & N. R. Co. v. Duncan & Orr* (Ala.), 8 R. R. R. 144, 31 Am. & Eng. R. Cas., N. S., 144.

Fisher v. Boston & M. R. Co

"(4) That, in forwarding said potatoes by the Metropolitan Steamship Line, it acted, as it believed, for the best interests of the shipper; said potatoes being perishable goods, and the weather during said month of March being uncertain; said Metropolitan Steamship Company affording the surest and quickest means of forwarding said potatoes to their destination."

After the evidence had been taken out, it was agreed to report the case to the law court for determination.

Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, SAVAGE, PEABODY, and SPEAR, JJ.

B. L. Fletcher, for plaintiff.

John B. & A. W. Madigan, for defendant.

WISWELL, C. J. On March 1, 1902, the Bangor & Aroostook Railroad Company received of the plaintiff a car load of potatoes to be transported over its own and connecting lines, and delivered to a consignee in Philadelphia; and on March 7th it received from the plaintiff two other car loads of potatoes, consigned to the same person in Philadelphia, for the same purpose. The route designated by the shipper for these three cars was by rail to Boston, and from Boston to Philadelphia by the Boston & Philadelphia Steamship Company; this designated route being plainly shown by this language in the bill of lading or shipping receipt given by the initial carrier, "Route via Boston and Philadelphia Steamship Company;" the same language being contained in each of the three shipping receipts. It is not claimed that there was any ambiguity whatever as to the route chosen by the shipper, and thus designated in the shipping receipts. These cars were duly transported by the initial and an immediate carrier, and delivered to the defendant, a common carrier, at Portland, the point of intersection. The defendant there received these three car loads of potatoes, and transported the same to its terminus in Boston; the first car arriving on March 7, and the other two on March 11, 1902.

At the time of the arrival of the last two cars in Boston, a general strike of teamsters and freight handlers existed, which commenced on March 10th, and continued until about March 14th, and this strike was of such extent that, as may be conceded, it became impossible, or at least impracticable, by the exercise of reasonable diligence, for the defendant to transfer these potatoes and deliver them to the next designated connecting carrier, the Boston & Philadelphia Steamship Company. Thereupon the defendant, without notifying either the consignor or the consignee, either by mail, telegraph, or telephone, although, as it appears, there were ample means of communication both by mail and by wire, delivered these potatoes on March 11th to the Metropolitan Steamship Company, by which they were transported

to New York, delivered to the Pennsylvania Railroad Company, and from there transported by that company by rail to Philadelphia, where they were delivered to the consignee. The cost of transportation by this route to the plaintiff was \$91.31 for the three car loads—more than it would have been if they had been transported by the route chosen by the shipper, and plainly designated in the shipping receipts. The plaintiff, having paid this extra cost of transportation under protest, seeks to recover that amount in this action, which comes to the law court upon a report of the evidence.

Independently of any stipulation in the contract limiting its liability, the defendant would unquestionably be liable for this loss to the plaintiff, caused by its failure to forward the goods by the designated route. The defendant's contract, by virtue of the acceptance of these cars with the route designated, was to transport them over its own line to Boston, and there to deliver them to the next designated connecting carrier; and for its failure to do so, to the injury of the plaintiff in the manner referred to, it would be liable to the plaintiff for the increased cost of transportation. *Proctor v. Eastern Railroad Company*, 105 Mass. 512. That the intermediate carrier is liable to the shipper for any loss which occurs through its fault, after the goods have come into its possession, and that the liability of the former carriers in the route terminates, when they have respectively transported the goods over their lines and delivered them to the next connecting carrier, is now almost universally established in this country.

But the contract of shipment between the initial carrier and the shipper contained various stipulations affecting the rights of the parties, and limiting the liability of that corporation. These stipulations inured to the benefit of the defendant. *Morse v. Canadian Pacific Railway Company*, 97 Me. 77, 53 Atl. 874. And it was expressly agreed in these contracts that the stipulations should be applicable to each carrier over any portion of the route. It is also well settled in this state, as well as universally in this country, that a common carrier may by agreement limit to a reasonable extent his common-law liability, but not his liability for the consequences of his own negligence. *Morse v. Canadian Pacific Railway Company*, supra.

These stipulations, so far as they affect this case, are as follows: "No carrier * * * shall be liable for any loss thereof or damage thereto, by causes beyond its control, or by floods or by fire from any cause wheresoever occurring; or by riot, strikes or stoppage of labor." "No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit. Every carrier shall have the right, in case of necessity, to forward said property by any railroad or route between the

point of shipment and the point to which the rate is given."

We may assume, for the purposes of this case, that for causes beyond its control, and without any fault upon its part, the defendant could not for the few days commencing Monday, the 10th, and extending to Friday, the 14th, deliver these goods to the designated connecting carrier at Boston, and the causes affecting its inability in this respect were covered by the stipulations above referred to. It is also undoubtedly true that, at the time the goods were forwarded by another route, it was impossible to tell with any degree of certainty how long the situation caused by the strike would continue, or how soon the potatoes could be delivered to and received by the steamship line between Boston & Philadelphia. There is also no question but that these stipulations—especially the one to the effect that the defendant, in case of necessity, had the right to forward the goods by any other railroad or route—were reasonable limitations. We come, then, to the question whether the defendant, under the circumstances of the case, in acting as a forwarder only, acted with that degree of care and diligence that the law and the situation demanded, and whether such a case of necessity existed as justified the defendant in forwarding these goods by the much more expensive route, without in any way communicating with the shipper, and without giving him any opportunity to give new and different instructions in view of the exigency which existed.

In determining this question, we assume that the duty and liability of the defendant as a common carrier had ceased when these goods had been transported over its own line to its terminus in Boston, and when it was unable to deliver them to the next carrier because of the situation referred to. *Plantation No. 4 v. Hall*, 61 Me. 517. But the duty still rested upon the defendant, as a forwarder, to exercise reasonable care and diligence to prevent unnecessary loss to the goods, and to save unnecessary cost to the owner in storage or transportation. Such forwarder should exercise the same degree of care to prevent loss or unnecessary expense that a prudent owner would have in the same situation. This is a familiar principle, which may be frequently found stated in the decisions. *Hooper v. Wells, Fargo & Company*, 27 Cal. 11, 85 Am. Dec. 211.

The gravamen of the plaintiff's complaint is that this deviation in route was made by the sender without communication with him, and without giving him an opportunity to give new instructions, when, as claimed by him, if he had been informed of the condition existing, and had an opportunity to exercise his discretion in this situation, he could have disposed of the potatoes in Boston without any loss, and in fact at a profit. It is undoubtedly a general rule that where the carrier is unable to deliver the goods to the next

designated carrier, and has an opportunity to do so, it is his duty to at once notify the shipper or consignee, and failure to give such notice will render him liable for any loss or injury resulting therefrom. "Where goods are thus held after failure or refusal of the connecting carrier to receive them, it is the duty of the initial carrier to at once notify the shipper or consignee, as the case may be." 6 Cyc. 484; and cases cited. "But where the goods can be properly cared for and held until the shipper can be communicated with, the carrier will not be justified in selecting another route without notice to him and instructions from him." *Louisville & Nashville Railroad Company v. Odil*, 96 Tenn. 61, 33 S. W. 611, 54 Am. St. Rep. 820. Some of the numerous cases to the same effect which might be cited are *The Convoy's Wheat*, 3 Wall. 225, 18 L. Ed. 194; *Michigan Central Railroad Company v. Mineral Springs Manufacturing Company*, 16 Wall. 318, 21 L. Ed. 297; *Peterson v. Case* (C. C.) 21 Fed. 885; *Inman v. St. Louis & Southwestern Railroad Company*, 14 Tex. Civ. App. 39, 37 S. W. 37; *Johnson v. New York Central Railroad Company*, 33 N. Y. 610, 88 Am. Dec. 416; *Goodrich v. Thompson*, 44 N. Y. 324.

In *Regan v. Grand Trunk Railway*, 61 N. H. 579—a case somewhat relied upon by the defendant—the carrier failed to give notice of its inability to forward the goods by the conveyance designated, but it was expressly found "that such notice would have avoided the loss, and that the plaintiff suffered no injury by reason of the defendant's agent." Thereupon the court decided that "neglect to notify the consignee of a change of route does not render the carrier liable for loss or damage happening from delay in the delivery of the goods, if such notice would not have avoided the injury." With which statement we entirely agree.

Applying these rules to the circumstances of this case, we think that the defendant failed to perform its duty toward the plaintiff by not giving him an opportunity to prevent, if possible, this largely excessive cost of transportation. No such exigency existed as prevented the defendant from holding the potatoes until the plaintiff could have been communicated with, and instructions received from him. One of these cars was an Eastman Heater Car, and the other two were lined cars, as they are called, all supplied with means of heating. In this situation, the potatoes were not of such a perishable character as required that they should be sent forward before there was time to hear from the owner, because, by the exercise of slight care, if the state of the weather had required it, the potatoes could have been kept from any injury from the frost. The arbitrary deviation from the route selected by the shipper without awaiting instructions was entirely unnecessary. As said by the court in *Michigan Central Railroad Company v. Mineral Springs Manufacturing Company*, 16 Wall. 318, 21 L. Ed. 297, "common fairness

Harold v. Baltimore & O. R. Co

required that at least he should have been told of the condition of things there, and thus left free to choose, if he saw fit, another mode of conveyance," or given an opportunity to dispose of his goods, if possible, without subjecting them to this large charge, in proportion to the value, for the transportation. And we are satisfied from the evidence in the case that this extra cost could have been prevented, and all loss to the plaintiff would have been avoided, if this notice had been given, and if the plaintiff had had an opportunity to dispose of his property where it was.

Judgment for plaintiff for \$91.31 and interest from the date of the writ.

HAROLD v. BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Sixth Circuit, December 14, 1904.)

[133 Fed. Rep. 384.]

Trial—Direction of Verdict—Insufficiency of Petition.

A court is not warranted in directing a verdict on motion of defendant, after answer filed joining issue on the facts, on the ground of the insufficiency of the petition, unless it is so absolutely defective that no judgment could properly be entered on a verdict for plaintiff.

Same.*

A petition alleged that plaintiff was a passenger on an excursion train on defendant's railroad; that in the train was a combination car, one-half of which was a baggage room without seats, having a door at the end, but no platform; that on the return trip such car was placed in the train, with the baggage room toward the rear next the second car; that it was after dark, and plaintiff, who was in such car, on account of its being crowded and warm went to the rear door, which was open, and, while standing there, was caused by the motion of the car to step forward through the door, and fell between the cars, receiving serious injuries; that owing to the darkness plaintiff could not see that there was no platform. Negligence was alleged in the use of such car, in the manner in which the train was made up, and in not using some means to protect passengers from the danger: *held*, that such petition presented issues for the jury, and that it was error for the court at the trial to direct a verdict for defendant on motion, on the ground of its insufficiency, after defendant had answered, but before the taking of testimony.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Musser & Kohler and Young & Wanamaker, for plaintiff.

Arrel, McVey & Taylor and Allen, Waters & Andress, for defendant.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The plaintiff in error was

*As to a carrier of passengers' duties with respect to vehicles, see monograph appended to St. Louis Southwestern Ry. Co. of Texas v. Parks (Tex.), 11 R. R. R. 688, 34 Am. & Eng. R. Cas., N. S., 688.

the plaintiff below. He brought the suit to recover damages sustained by him while riding as a passenger on an excursion train of the defendant, on the return trip of the train, which had left Akron, Ohio, on the morning of August 16, 1902, and run to Sandusky, where the passengers left the train and went by boat to Cedar Point, where, during the day, they had a picnic.

The plaintiff purchased a round-trip ticket at Akron before starting. There were a large number of passengers on the train, which ran in two sections of eight cars each, much crowded. Late in the afternoon the passengers, the plaintiff among them, returned to Sandusky, and took the train on its starting to return to Akron. The first section of the train had already gone when the plaintiff came to the station, and the second section was about to go. The car which the plaintiff took was a combination car, having in one end a smoking room with seats, and in the other end a baggage room which had no seats. This car had a platform at the end containing the smoking room; at the other end it had none, but there was a door in it. In the morning, on the outgoing trip, the end without a platform was next the engine; on the return its position was reversed, the end having the platform being next the engine, and the end having none being connected with a passenger car next in the train. The plaintiff went aboard this combination car by the platform at the end of the smoking room, which he found already full of passengers, some standing up. After standing for a while, he went into the baggage room where were a large number of passengers, and where he sat down for a time on a basket. The room became hot and close, and the plaintiff went to the rear door for air. The door was standing open. There was no light between this car and the next, and the one in the baggage room was so dim and poor that the plaintiff could not see the condition of things where he was. It had become nighttime before the train reached Chicago Junction, a station on the route. As they were nearing that place the car in which the plaintiff was made a sudden lurch, which caused the plaintiff to step forward beyond the end of the car. There being no platform there, he went down through the open space between the cars, and sustained injuries which resulted in the loss of one of his legs and the two first fingers of one hand.

In his petition the plaintiff charges the defendant with negligence "in using said baggage compartment for the carriage of passengers, and in not furnishing plaintiff with a suitable, proper, and safe place in which to ride; and also in using said car with the baggage end at the rear next to the following coach, so that an open space was left between said cars, as aforesaid, through which passengers on said train were liable to fall and be injured; and also in not furnishing and providing some suitable and proper device or means to prevent persons not knowing of said open space from falling between

Harold v. Baltimore & O. R. Co

said cars onto the track of said railroad and thereby suffering injury"; and he says he was without any fault whatever contributing to his injury. Before the commencement of the trial the plaintiff was allowed to amend his declaration, and it then stated the facts to be substantially as above narrated. The answer admitted the plaintiff had been injured, but denied all other material allegations of the petition, and set up the defense of contributory negligence on the part of the plaintiff.

The case proceeded to trial. The plaintiff's counsel made an opening statement of the facts he expected to prove, which were, in substance, those stated in the petition, except that he said that the car "swayed slightly," instead of making a "sudden lurch," as alleged in the petition. Before taking evidence the defendant's counsel moved the court to direct the jury to find a verdict for the defendant upon the case as stated in the pleading and by counsel, stating the purpose of the motion to be to "raise now the question of law as to whether there is any case stated in this amended petition against the defendant company that entitles the plaintiff to a verdict." Upon argument, the bill of exceptions states, "It being admitted to the court by counsel for the plaintiff that the 'sudden lurch' of said car, mentioned in the third paragraph of plaintiff's amended petition as causing the plaintiff to step forward and to fall between the cars through said open space, was not a negligent act on the part of said defendant, and that no claim was made by plaintiff that such act was negligence or negligently caused by defendant," the court sustained the motion. The plaintiff moved to amend his petition so as to state that the plaintiff, supposing there was a platform there, and because the room was hot and close, stepped through the door, which stood open, instead of alleging that he was thrown forward by a "sudden lurch" of the car. This motion was refused. The court directed the jury to find a verdict for defendant, which was done. The record does not very clearly advise us of the particular ground of the court's ruling. But the fair inference is that the court thought that upon the allegation of the petition the "sudden lurch" was the proximate cause of the plaintiff's injury, and, as that was admitted not to have been negligently caused, the ground of action had fallen out, and there was nothing further for the jury to consider.

We think the court was in error. The petition did not allege the lurching of the car was caused by any negligence of the defendant, and amounts to nothing more than the statement of what is frequently experienced by those traveling on railways. It was a mere incident of the means by which the plaintiff was brought into the place of danger where he suffered the injury. The ultimate causation was in the negligent organization of the train, supposing it to have been negligent, to which all the other factors in the situation led

Southern Ry. Co. v. Lockwood Mfg. Co

up. We are not to be understood as expressing any opinion as to whether there was negligence on the part of the defendant in the use of this car in the connection in which it was placed or in any other respect. That is a question for a jury. The proper way to raise the question of the sufficiency of a petition is by a demurrer, and while the course pursued here might be permissible in a case where it is perfectly clear that the petition is so defective that no judgment could properly be entered upon a verdict for the plaintiff, and so the trial would be a waste of time, we do not think this petition so absolutely defective as to warrant that practice. By answering the petition the defendant had lost its right to interpose a demurrer, and it would be anomalous if it could, after issue joined, revert to its former position. Said Judge Campbell, in *Jackson v. Collins*, 39 Mich. 557, 560: "When issue is joined on the facts, the declaration cannot be held fatally defective, unless inconsistent with any reasonable ground of action."

Having regard to the duty of the carrier to provide a proper place for its passengers, the crowded and uncomfortable conditions to which the plaintiff was subjected, and the leaving open the door at the rear end of the car without a light there, we think the question whether the plaintiff was guilty of contributory negligence was also one for the jury. For these reasons, we are constrained to think the court erred in sustaining the motion of the defendant and directing a verdict and judgment against the plaintiff.

The judgment will be reversed, with costs. A new trial should be awarded, and the court below is authorized to permit the plaintiff to amend his petition if he is so advised.

SOUTHERN RY. CO. v. LOCKWOOD MFG. CO.

(Supreme Court of Alabama, Nov. 29, 1904.)

[37 So. Rep. 667.]

Carriers—Demurrage Charges—Lien—Delivery.*

The placing by a carrier of a car on the team track, to be unloaded by the consignee, is not such an absolute delivery to him of the lumber therein as to cut off any future right of lien thereon of the carrier for demurrage charges because of the consignee not unloading in the time limit therefor.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action of trover by J. W. Lockwood and others, partners as the Lockwood Manufacturing Company, against the South-

*As to the right to impose demurrage charges, see foot-note appended to *New Orleans & N. E. R. Co. v. George & Co. (Miss.)*, 9 R. R. R. 786, 32 Am. & Eng. R. Cas., N. S., 786, where all preceding authorities in this series are collected or referred to.

Southern Ry. Co. v. Lockwood Mfg. Co

ern Railway Company, for conversion of lumber. Judgment for plaintiffs. Defendant appeals. Reversed.

The defendant pleaded the general issue, and the following special plea: "For further answer to the complaint, defendant says that the car of lumber, a part of which forms the subject-matter of this suit, arrived at Birmingham over defendant's line on March 22, 1902, to be delivered to the plaintiffs in this cause; that on the same date plaintiffs were notified of the arrival of the car; that the car was not ordered placed until March 29th, at 12 m.; that car service charges in the sum of one dollar per day, or fraction thereof, began to accrue on said car at 7 a. m. March 26th; that, at the time the car was ordered placed, car service charges were due on said car for two days and five hours, the 28th day of March having been a holiday; that said charges, amounting to \$3, were paid when car was ordered placed; that car was placed at 12 m. March 31st; that the nineteen hours' free time which plaintiff had to unload the car expired at 7 a. m. April 1st; that at 4 p. m. on April 2d demand was made on plaintiff for the additional car service, amounting to one dollar; that plaintiff refused to pay same, whereupon defendant declined to deliver the lumber which was remaining on the car at that time, and which forms the subject-matter of this suit. The defendant says that, at the time the alleged cause of action arose, it was a member of the Alabama Car Service Association, and, as such, had bound itself to conform to the rules and regulations of said association; that the rules of said association required it to make car service charges in the amount of \$1 per day, or part thereof, on each car after 48 hours had elapsed after notice to consignee of the arrival of such car; that this rule was enforced by the defendant in all cases; that it was embodied in the contract of shipment with plaintiffs, either expressly or impliedly; and that plaintiffs refused to pay the proper charges assessed in accordance with this rule." The case was tried upon issue joined upon these pleas.

The undisputed testimony showed the following facts: A car of lumber, consigned to plaintiffs, arrived at Birmingham, over defendant's line of railroad, from Berry, Ala., on Saturday, March 22, 1902. The plaintiffs were notified of the arrival of the car on the afternoon of that day. At 12 o'clock Saturday, March 29th, one of the plaintiffs called at the office of the defendant's agent in Birmingham and paid the freight on this car, and, in addition thereto, \$3 car service or demurrage which had accrued on the car up to that time; at the same time order in the car placed for unloading. The car was placed at 12 o'clock March 31st on one of defendant's team tracks—the usual place for unloading bulk shipments of this kind. At 4 o'clock on the afternoon of April 2d the lumber was only partially unloaded, and the car still detained. One dollar additional car service having accrued

after the car had been placed for unloading, the defendant, through its car service clerk, presented the plaintiffs a bill for this amount, which they refused to pay. Thereupon the car was sealed, with a part of the lumber still on board, and placed beyond the reach of the plaintiffs, and the lumber held for payment of demurrage charges. This is the lumber sued for.

The operation of rules 1, 2, and 9 of the Alabama Car Service Association, which were introduced in evidence, and which are the rules enforced by the defendant in connection with car service or demurrage charges, is clearly explained by the following uncontroverted testimony of J. B. Franklin, defendant's car service clerk: "In March and April of last year I was car service clerk for the Southern Railway Company at Birmingham, and my duties were to look after the cars that arrived here over the Southern Road for the city delivery, and see that the consignees were promptly notified, and that the cars were placed after the freight and all charges were paid, and, after the cars were not unloaded within 48 hours after the parties were notified, to collect all car service due on them. The car service charged was \$1 per day, or fraction thereof, on each car, after expiration of the free time of 48 hours. I remember a car of lumber having arrived on the 22d day of March, 1902, consigned to the Lockwood Manufacturing Company. That was on Saturday, and notice was given to Lockwood Manufacturing Company that this car had arrived, sometime between 1 and 5 o'clock that afternoon. The car was ordered placed at 12 o'clock March 29th. Up to that time car service charges had accrued to the amount of \$3. I figure that out this way: I gave notice of arrival of the car on the afternoon of the 22d, but, under the rules, the time did not commence on the car until 7 o'clock the next morning, the 23d. This being Sunday would throw it the next morning, and the time commenced to count 7 o'clock Monday morning, the 24th. The 48 hours' free time allowed expired at 7 o'clock on Wednesday morning, the 26th, and then the car service began to accrue. Thursday morning at 7 o'clock one day had elapsed, and Saturday morning at 7 o'clock two days had elapsed. Friday, the 28th, was a holiday, and holidays and Sundays are not considered in estimating the time for car service charges. Up to 12 o'clock Saturday, the 29th, when the car was ordered placed, 2 days and 5 hours had elapsed, and \$3 car service was collected. The car was placed at 12 o'clock March 31st. Under the rules of the Railroad Commission, the company is entitled to 48 hours in which to place the car, after the freight and all charges have been paid. If the company takes more than that time, it must pay the shipper \$1 a day, or any part thereof, on each car. In counting the time against the company, Sundays and holidays are not included. Just like the car service, the rule works both ways. March the 30th hav-

Southern Ry. Co. v. Lockwood Mfg. Co

ing been Sunday, the company placed this car in 24 hours, according to the rules for estimating time, after the car was ordered placed. After the car was placed, the Lockwood Manufacturing Company had 19 hours, which they had already paid the demurrage for, in which to unload. These 19 hours had expired at 7 o'clock on the morning of April 1st, and at that time car service began to accrue again. I did not present a bill to any member of the firm of the Lockwood Company for any additional car service until late in the afternoon on April 2d, about 4 o'clock. I did not present the bill on the 1st because I wanted to favor Mr. Lockwood. The bill which I presented on the 2d was for \$1, and I presented it to Mr. Lockwood—the old gentleman, who was the first witness for the plaintiff. He was at the time at his place of business, on Twenty-Sixth street." It was also shown that plaintiff had notice of the regulation of defendant in reference to car service or demurrage charges.

Among the other charges requested by the defendant, and to the refusal to give each of which the defendant separately excepted, was the general affirmative charge in its behalf.

James Weatherly and J. T. Stakely, for appellant.
White & Howze, for appellees.

DOWDELL, J. The evidence in this case upon the principal issue involved is practically without dispute. The reasonableness of the railway company's rules which were adopted by the Alabama Car Service Association relative to demurrage charges on its cars, and the time limit in the placing of its cars for unloading, and the unloading of the same by the consignee, etc., as shown by the evidence, seems not to have been denied or questioned. We concur in the statement made by counsel for appellees in their brief that the only question in this case necessary to be considered is whether the appellant had released its lien upon the lumber by placing the car on the team track for the purpose of being unloaded. The proposition seems quite clear that, if the appellant railway company had no lien upon the lumber, then, in removing the car with the lumber on it, and holding the lumber for the purpose of enforcing a pretended lien, it (the railway company) would be guilty of a conversion. This, we understand, is not controverted by counsel for appellant. The contention of the appellees is that the placing of the car of lumber on the team track to be unloaded by the consignees was a delivery of the lumber to the consignees, and such a delivery of possession of the property as amounted to a release of whatever lien the railway company had on the lumber. It is not denied that the railway company, as a common carrier, had a lien on the lumber for transportation charges, and for the demurrage charges which had accrued after notice to the consignees of the arrival of the car of lumber, under the company's rules. Indeed, this question is not

involved, as the undisputed evidence shows that the charges had been paid by the consignee when the car was placed on the team track, to be there unloaded by the consignee; and it was at this time that the appellee, who was the consignee, claims that the lumber was delivered by, and passed from the possession of, the railway company into its possession, discharged of all antecedent liens, and not subject to any subsequent lien. It is not denied that the car remained upon the team track, where it had been placed by the railway company for the appellee's convenience in unloading the same, for the time limit allowed by the rules of the railway company, and that the demurrage for which a lien is claimed accrued after the expiration of the time limit for unloading. As stated above, the reasonableness of the rule as to time limit and demurrage charges is not questioned, nor is it denied that the appellee had notice of such rule. The question, then, is whether a lien on the lumber remaining on the car arose in favor of the railway company for demurrage accruing subsequent to the delivery in the manner stated, and after the expiration of the time limit for unloading the car.

Leading up to the proposition, it may be stated that this court has held that a rule of a railroad company that a party to whom freight is consigned must receive the same within 48 hours after notice is a reasonable one, and a charge for storage after that time is legal. *Gulf City Construction Co. v. L. & N. R. Co.*, 121 Ala. 621, 25 South. 579. And it may be said, as a corollary to this, that a railroad company may legally charge storage or demurrage for its cars used and occupied by consignees beyond a reasonable time after the contract of transportation has been fulfilled. *Miller et al. v. Georgia R. & Banking Co.*, 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323, 30 Am. St. Rep. 170. See, also, 20 Am. & Eng. R. R. Cases (N. S.) 450, where will be found a collation of authorities on the question. It is a well-settled proposition of law that a warehouseman has a lien for his charges. *Steinman v. Wilkins* (Pa.) 42 Am. Dec. 254, and note on page 257; 28 Am. & Eng. Ency. Law (1st Ed.) p. 663. It is equally well settled that where a common carrier, after the arrival of freight, gives notice to the consignee, and places the goods in its warehouse, its liability thereafter is that of a warehouseman. *Collins v. Alabama Great Southern R. Co.*, 104 Ala. 390, 16 South. 140. And the carrier is entitled to additional compensation for its services as warehouseman. *Gulf City Construction Co. v. L. & N. R. Co.*, supra.

It would seem, if the carrier can make an additional charge when it stores the goods in its warehouse, and have a lien for such charge, upon like principle, and for the same reasons, it may make an additional charge, and have a lien therefor, when the goods remain in its cars after its liability as a common carrier has ceased. *Miller v. Georgia R. & Banking Co.*, supra; *Miller v. Mansfield*, 112 Mass. 260; *New*

Orleans & Northeastern R. Co. v. George (Miss.) 35 South. 193. In *Miller v. Georgia R. & Banking Co.*, it was said: "We do not think it material, as affecting the right to make a charge of this character, that the goods remain in the cars, instead of being put into a warehouse." And in the case of *New Orleans & Northeastern R. Co. v. George*, supra, it was said: "There is no force in the argument which concedes the right of the carrier to make demurrage charges, but contends that the goods must be delivered, and then the carrier sue for the amount. This course would give the dishonest and insolvent an unfair advantage, and would breed a multiplicity of suits."

The foregoing authorities fully sustain the doctrine of the right of the carrier to a lien upon the goods transported for demurrage charges. Coming, then, to the main question in the case before us, was the placing of the car of lumber on the team track of the railway company for the purpose of being unloaded by the consignee such an absolute and unqualified delivery of the lumber into the possession of the consignee as would cut off any future right of lien for legitimate charges for car service or demurrage subsequently accruing? We think not. The delivery of the possession of the lumber, in the manner in which it was made, and under all the conditions and circumstances, was a qualified delivery. The delivery was conditioned upon the lumber being unloaded from the car within a fixed time, and, upon a failure of the consignee to comply with this condition, additional rights and liabilities between the parties arose. The right of the consignee's possession of the lumber was accompanied with the duty on his part to remove the same from the car. It would hardly be contended that the placing of the car for the purpose of unloading terminated all liability of the railway company, both as carrier and warehouseman, while the lumber yet remained on its car. Upon the same principle that a railroad company, when its relation becomes that of a warehouseman, has a lien upon goods for storage charges, it has a lien upon goods for demurrage or car service. A contrary doctrine would defeat the purpose of the rule of the Car Service Association adopted by the railroads, and which was made in the interest of commerce generally, and for the benefit of shippers as well as carriers. The indefinite detention of cars by shippers would naturally tend to impair the ability of the carrier to meet the demands of commerce, and lessen the facility of transportation.

The case of *Lane v. Old Colony & Fall River R. Co.*, 14 Gray (Mass.) 143, is somewhat similar in principle to the case in hand. In that case the railroad company had placed a shipment of coal in a bin on the company's ground, to be removed by the consignee; and, after a part had been hauled away, the consignee refused to pay the freight and storage charges. It was held that the railroad company still had a

Mannon v. Camden Interstate Ry. Co

lien on the coal which had not been hauled away for such charges. We think, in principle, there can be no difference between a delivery of the coal in a bin, to be taken and hauled away by the consignee, and a delivery of the lumber on the car on the railway company's team track for a like purpose.

Our conclusion is that a lien for the subsequent charges for car service attached to the lumber in favor of the railway company. The evidence being without conflict, the trial court erred in refusing the general charge requested by the defendant; and for this error the judgment will be reversed, and the cause remanded.

Reversed and remanded.

MCCLELLAN, C. J., and HARALSON and TYSON, JJ., concur.

MANNON v. CAMDEN INTERSTATE RY. CO.

(Supreme Court of Appeals of West Virginia, Dec. 20, 1904.)

[49 S. E. Rep. 450.]

Street Railways—Passengers—Appliances—Degree of Care.*

Street railway companies, for the protection of their passengers, are bound to exercise extraordinary care, and the utmost skill, diligence, and human foresight, in keeping in repair the necessary appliances used by them in the transportation of such passengers, and the slightest negligence on their part renders them liable for all accidents to such passengers occasioned thereby.

Same—Same—Negligence—Breaking of Trolley Wire.

The frequent breaking of a trolley wire at or near a given point is evidence to justify a jury in finding such a company negligent in discharging the duties it owes to the public and its passengers.

Same—Contributory Negligence—Jumping from Moving Car to Avoid Danger—Question for Jury.†

Whether a passenger acted with ordinary prudence in leaping from a

*As to the degree of care required of a carrier of passengers, see foot-note appended to *Johnson v. Seattle Elec. Co.* (Wash.), 12 R. R. R. 786, 35 Am. & Eng. R. Cas., N. S., 786; foot-note appended to *Logan v. Metropolitan St. Ry. Co.* (Mo.), 12 R. R. R. 753, 35 Am. & Eng. R. Cas., N. S., 753; foot-notes appended to *Fitch v. Mason City & C. L. Traction Co.* (Iowa), 12 R. R. R. 451, 35 Am. & Eng. R. Cas., N. S., 451; foot-note appended to *Howell v. Lansing City Elec. Ry. Co.* (Mich.), 12 R. R. R. 61, 35 Am. & Eng. R. Cas., N. S., 61.

†As to whether it is contributory negligence for a passenger to alight from a moving train or car, see foot-note appended to *Southern Ry. Co. v. Bandy* (Ga.), 12 R. R. R. 736, 35 Am. & Eng. R. Cas., N. S., 736; foot-note appended to *McDonald v. City Electric Ry. Co.* (Mich.), 12 R. R. R. 436, 35 Am. & Eng. R. Cas., N. S., 436; *Elwood v. Connecticut Ry. & Lighting Co.* (Conn.), 12 R. R. R. 518, 35 Am. & Eng. R. Cas., N. S., 518 (alighting from street car under belief that car had stopped at terminus, according to conductor's announcement); *Howell v. Lansing City Elec. Ry. Co.* (Mich.), 12 R. R. R. 61, 35 Am. & Eng. R. Cas., N. S., 61 (jumping from street car when collision was imminent).

†As to whether error of judgment, caused by fright, in avoiding danger constitutes contributory negligence, see foot-note appended to *St. Louis & S. F. R. Co. v. Brock* (Kan.), 12 R. R. R. 613, 35 Am. & Eng. R. Cas., N. S., 613.

Mannon v. Camden Interstate Ry. Co

car in motion, or from a rash apprehension of danger which did not exist, under circumstances of age, time, place, experience, and other facts, about which reasonable men might differ as a justification for such conduct, is a question of fact for a jury, and not a question of law for the court.

Appeal—Demurrer to Evidence.

Judgment of the circuit court overruling a demurrer to evidence will be affirmed unless it is contrary to the plain preponderance of the evidence, or it is without evidence to support it as to some material question at issue.

(Syllabus by the Court.)

Error to Circuit Court, Cabell County; E. S. Doolittle, Judge.

Action by Charles Mannon against the Camden Interstate Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Vinson & Thompson, for plaintiff in error.

Geo. I. Neal and Campbell, Holt & Duncan, for defendant in error.

DENT, J. The Camden Interstate Railway Company complains of a judgment against it in favor of Charles Mannon, rendered by the circuit court of Cabell county on the 27th day of March, 1902, for the sum of \$1,500, damages occasioned by an accident.

On the 12th day of September, 1901, Charles Mannon, the plaintiff, an unsophisticated country boy from the state of Ohio, boarded an open car on the defendants' street railway line extending from the city of Huntington to the town of Guyandotte. While the car was running at a rapid rate, the trolley wire, which had been in use since 1893, and which had broken quite a number of times near the same spot, parted, and made considerable noise, causing the wires to rattle, and one of the poles, rotten near the ground, to brake off and fall over against the wires. The boy became excited and alarmed along with the other passengers, and before the car could be stopped, being apprehensive of danger, leaped from the car, broke his leg, and tore the ligaments of his ankle, so that he became permanently injured for life. The defendant demurred to the evidence, and the jury found a verdict for \$2,500. The defendant moved to set it aside as excessive, but the court, having determined the demurrer to the evidence in favor of the plaintiff, and the plaintiff having released \$1,000 of the verdict, entered judgment against the defendant for \$1,500, following the case of *Ohio R. R. Co. v. Blake*, 38 W. Va. 718, 18 S. E. 957. It is sufficient to say with regard to this matter that \$1,500 is not excessive, considering the nature and character of the injury received, and that the plaintiff is maimed and disfigured for life. It is doubtful whether \$2,500 could be considered an excessive verdict as a matter of compensation in consideration of the character of

the injury received by a strong, healthy boy 18 years of age.

There are really only two questions of importance that are presented by the record in this case: First, was the defendant guilty of negligence? Second, was there such apparent danger as justified the plaintiff leaping from the car?

The law on both these questions seems to have been fully considered and settled. They are primarily jury questions, and, if the evidence in relation thereto is sufficient to sustain the verdict of a jury, this court is bound to affirm the judgment overruling the demurrer.

As to the first of these questions, the defendant is in duty bound to the public, from which it enjoys its franchise and fares, to exercise the utmost diligence possible to secure the safe transportation of its passengers, of all ages, character, disposition, and information. To this end it must furnish appliances of the most approved construction, and keep them in perfect repair, so far as human skill and foresight can provide. It must at all times exercise the highest degree of vigilance in superintending the appliances used by it, so that they may be kept in the best possible condition, for it is using the most dangerous of all propelling agents, and to neglect its duties in this respect is to trifle with human life, and render its negligence criminal in its nature. *Snyder v. Wheeling Electrical Company*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922; *Searl v. Ry. Co.*, 32 W. Va. 370, 9 S. E. 248; *Cooper v. Ry. Co.*, 24 W. Va. 37. The slightest negligence on the part of the railway company is gross negligence. *Railroad Company v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Railroad Company v. Derby*, 14 How. 486, 14 L. Ed. 502; *The Steamboat New World v. King*, 16 How. 469, 14 L. Ed. 1019; *R. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627. The cases on this question are generally reviewed in the case of *Spellman v. Lincoln Rapid Transit Company*, 36 Neb. 890, 55 N. W. 270, 20 L. R. A. 316, 38 Am. St. Rep. 753.

The evidence in the present case from which a jury would have the right to find negligence is the smallness of the wire, its use, wear and tear, and exposure to the elements for 10 years, its frequent breaking near the same place, its patch-work condition and the rotten character of the line poles, all tending to show want of that degree of care that the law requires. The fact that the new patch out of old wire broke tends to show that the wire used was for some reason weaker than the old wire which had been breaking previously.

In the case of *Railway Company v. Bowles*, 92 Va. 738, 24 S. E. 388, it is said: "Electricity is an agency no less powerful and dangerous than steam, and imposes equal obligations upon those who use it. The trolley wire is a contrivance essential to the use of electricity in the mode adopted by the defendant company, and the frequently recurring accidents which happened to the particular wire which is the subject

United States Express Co. v. Joyce

of investigation in this controversy were quite sufficient to warn the defendant of its unsafe condition."

On the question of negligence the evidence is more than abundant to sustain the verdict of a jury according to the law as settled beyond dispute or doubt.

Nor is the law less settled on the question of apparent danger. It is not necessary that the danger actually exists, but that the plaintiff has been placed by the negligence of the defendant in a position which has to him the appearance of imminent danger threatened, and forces him to momentarily act for the preservation of his safety and life. This is a question for the jury to determine from the negligence of the defendant, the nature of the accident, the age and experience of the plaintiff, and all the surrounding circumstances of time, place, and conduct of others. Whether the passenger exercised ordinary or reasonable care under the circumstances, or acted from a rash appearance of danger which did not exist, is a question of fact, and not of law. 1 *Thomp. Neg.* §§ 80, 81; *Poulsen v. Nassau Electric R. Co.*, 18 App. Div. 221, 45 N. Y. Supp. 941; *Gannon v. N. Y. Ry. Co.*, 173 Mass. 40, 52 N. E. 1075, 43 L. R. A. 833; 3 *Thomp. Neg.* § 3558; *Choquette v. Southern R. Co.*, 80 Mo. App. 515.

The plaintiff, by its demurrer to the evidence, having admitted that, if there was evidence to support it, the finding of the jury would have been against it, both as to the question of negligence and the justifiable conduct of the plaintiff under the circumstances, this court cannot do otherwise than affirm the judgment of the circuit court, overruling the demurrer to the evidence.

UNITED STATES EXPRESS COMPANY v. JOYCE et al.

(Supreme Court of Indiana, Dec. 29, 1904.)

[72 N. E. Rep. 865.]

Appeal.

Where an appellee assigns no cross-error on a ruling against him, his objections thereto cannot be considered on appeal.

Action on Shipping Contract—Estoppel.

Where plaintiff, in an action against a carrier, founds his claim on a shipping contract with defendant, he cannot contend that he was not bound by its terms.

Carriers of Live Stock—Limiting Liability—Valuation of Property—Partial Loss—Horses Sold for Declared Value.

Where the contract between a shipper of horses and the carrier provided that the latter should be liable only to the extent of actual damage, which should in no case exceed the valuation of the shipment declared by the shipper, and there was a partial loss, but the horses thereafter brought the full declared value, the carrier was not exempt from liability, but the shipper was entitled to recover such a proportion of the actual loss as the declared value of the shipment bore to the actual value.

Same—Same—Same—Construction of Contract.

The contract between a shipper of horses and a carrier provided that

United States Express Co. v. Joyce

the shipper should value the stock, and carriage charges be based thereon; that the charges on the shipment should be for horses of a value not exceeding \$75 each, \$225, and that when the value declared by the shipper should exceed such value an addition should be made according to a schedule which followed. Thereafter in the contract it was stated that the shipper declared values "hereinafter mentioned to be the true values of said animals, to wit, \$2,100," for each car load lot, and it was stipulated that the shipper released the carrier from all liability save actual damage not to exceed the valuation declared by the shipper: *held*, that the valuation of \$75 each was for the purpose of determining the carriage rate, while the valuation of \$2,100 on the whole lot was intended to fix the basis of liability.

Hadley and Gillett, JJ., dissenting.

Appeal from Circuit Court, Gibson County; O. M. Welborn, Judge.

Action by John E. Joyce and others against the United States Express Company. From a judgment for plaintiffs, defendant appeals. Transferred from Appellate Court under specification 2, § 10, c. 247, p. 565, Acts 1901 (section 1337j, Burns' Ann. St. 1901). Reversed.

See 69 N. E. 1015.

Baker & Daniels and Fields & Harmon, for appellant.

Buskirk & Brady and Embree & Benson, for appellees.

DOWLING, C. J. Action by the appellees against the appellant for damages to two car loads of horses shipped by the appellees under special contracts with the appellant as a common carrier. Demurrers to the amended complaint were overruled, and the appellant answered in three paragraphs; the first being a general denial; the second and third alleging facts upon which the appellant based its denial of liability, except in the nominal sum of \$5. Demurrers to the second and third paragraphs of answer were sustained. The cause was tried by the court, and a special finding of facts was made, with its conclusions of law thereon. To each of the five conclusions of law the appellant excepted, and the second, third, fourth, and fifth conclusions are now assigned by it as error.

The court found that the appellees were, on and prior to May 23, 1901, partners engaged in the business of buying, selling, and shipping horses; that on said date they owned 30 high-grade carriage horses, which they had collected, and were preparing to ship to Buffalo, N. Y., there to be disposed of at a special sale, which was advertised for May 25, 1901; that on said 23d day of May, 1901, the appellees applied to the appellant express company, a common carrier, for the transportation of said horses from Princeton, Ind., to Buffalo, N. Y., to be delivered at the latter point to the appellees' agents having charge of the special sale; that said horses were thereupon delivered to the appellant by the appellees, the rate of compensation being agreed upon in the sum of \$225; that before receiving said horses, the appel-

lant produced a live stock contract, signed by its agent, and requested the appellees to sign the same, which they did; that among the provisions and requirements of said contract were the following: "Notice to Shippers. The shipper will value his stock, which valuation will be inserted in this contract, and the charge for carriage will be based on such valuation. * * * Limited Liability live stock contract.

* * * The Express Company undertakes to forward to the point reached by the Express Company which is nearest to destination, the animals and paraphernalia hereinafter mentioned, * * * to wit, twenty-eight horses, * * * for the sum of two hundred and twenty-five dollars, * * * which charge is fixed by and based upon the value of said animals and paraphernalia is declared by the shipper, as hereinafter mentioned. * * * The charges on the shipment described above at the values specified below will be as follows: For horses, jacks or mules of a value not exceeding \$75 each, \$225. * * * When the value declared by the shipper exceeds the value stated above, an addition to the above-mentioned charge will be made according to the following schedule, to wit: [Here follows a table of charges graduated in proportion to excess of valuation.] * * * The shipper, in order to avail himself of said alternative rates, and in consideration thereof being asked by the Express Company to value said property, now declares the values hereinafter mentioned to be the true values of said animals and paraphernalia so to be shipped as follows, to wit: * * *

(Number and kind): Twenty-eight horses, value \$2,100. * * * The shipper hereby releases and discharges the Express Company from all liability for delay, injuries to, or loss of, said animals and paraphernalia from any cause whatever, unless such delay, injury, or loss shall be caused by the negligence of the agents or employees of the Express Company, and in such event the Express Company shall be liable only to the extent of actual damage, which shall in no event exceed the valuation herein declared by the shipper." The court further found that before the appellees signed this contract they objected to the valuation being fixed at not to exceed \$75 per head, claiming the stock was worth much more, and asked that this valuation be stricken out; but were informed by the appellant's agent that this was the only form of contract he had, and the horses would not be shipped without a valuation inserted. That the appellees thereupon delivered 30 horses to the appellant for shipment under said contract, but the same were not delivered at Buffalo in time for such special sale, but, by reason of the negligence of the appellant, the horses were injured through the overturning of the car in which they were being carried, and were thereby rendered unfit to be put on the market at said sale. That, if the horses had been delivered in good condition, and pursuant to the contract of shipment, in time for such special

sale, they would have been of the average value of \$200 per head, or \$170 per head if delivered in good condition on the 25th day of May, 1901, at other than a special sale; that said horses were on May 27, 1901, sold by the agents of the appellees for the gross sum of \$3,470, and the net amount received therefor by the appellees was \$2,916.20. The court also found that another contract of shipment, exactly the same in its general provisions as that of May 23, 1901, was entered into between the same parties on June 13, 1901, under similar circumstances, except that it does not appear that the shippers objected to the insertion of the \$75 per head valuation; that 28 horses were delivered to the appellant under the latter contract, and were delivered by it in Buffalo, N. Y., on June 16, 1901, in a damaged condition, owing to the negligence of the appellant; that thereafter, on June 17, 1901, the agents of the appellees sold said 28 horses for the gross sum of \$3,615, or the net sum of \$3,322.70, which latter amount was paid over to the appellees; that, if the horses had been delivered at their destination in good condition, they would have been worth on an average of \$170 per head; that all of said horses were handled by the agents of the appellees to the best advantage, and realized their full value in their damaged condition.

The court, upon the foregoing findings of fact, stated its conclusions of law as follows: "(1) The court finds that by the written contract executed May 23, 1901, plaintiffs are concluded as to the number of horses shipped of that date, and that for the purposes of this action, no more than twenty-eight can be considered, and that as to the damages to said two horses, amounting to \$205.59, plaintiffs cannot recover. (2) The plaintiffs are not precluded from showing the actual value of said horses at the city of Buffalo at said special sale of May 25, 1901, or their value in said city within a reasonable time for their arrival at said city after their departure from Princeton, but that the damages cannot exceed the sum of twenty-one hundred dollars, with interest added. (3) That the plaintiffs are entitled to recover on the first and third paragraphs of their complaint the sum of two thousand one hundred dollars (\$2,100), together with interest at the rate of six per cent. per annum thereon from date of written notice to the defendant of said injuries; in the aggregate, the sum of \$2,195. (4) That the plaintiffs are not precluded from showing the true value of the horses in good condition shipped June 13, 1901, in the city of Buffalo, within a reasonable time for their arrival at said city, from the time of their departure from Princeton, but that the damages for any injury thereto occasioned by defendant's negligence cannot exceed the sum of \$2,100. (5) That the plaintiffs are entitled to recover from defendant on account of the injuries complained of in the second paragraph of their complaint the sum of one thousand four hundred and thirty-seven and

United States Express Co. v. Joyce

30-100 dollars, together with interest at the rate of six per cent. per annum thereon since the date of the written notice by plaintiffs to defendant of said injuries; in the aggregate the sum of \$1,499.60."

The questions presented by this appeal are: First. In an action brought by a shipper against a carrier for injury to goods shipped, is the former precluded from showing their real value when he has previously signed a contract for their transportation providing that the carrier shall be liable only for actual damage suffered, and in no event for a greater amount than the valuation of the property declared by the shipper and inserted in the contract? Second. If he is not so precluded, what is the measure of his damages for a partial loss of the goods where they have realized in their damaged condition a sum equal to or greater than their declared value?

The position of the appellant is that, inasmuch as the appellees placed a value upon their own property, they are thereby estopped from proving a greater value; and, if the property in its damaged condition brought the full declared value, interest, and freight charges, there can be no recovery. The appellees contend, first, that they are not bound by their valuation, since no real choice was offered them between a limited liability contract and one unlimited in its terms; second, if they are so bound, the measure of their recovery is the difference between the real value of the animals in a sound condition and the price realized upon their sale in a damaged condition; such recovery not to exceed the declared value of \$2,100. The trial court enforced that term of the contracts, which limited the total amount of damages recoverable to \$2,100 per car load, and, since the appellees have not assigned cross-errors on this appeal, their first contention cannot be considered. Besides, as the appellees found their claim and action on the shipping contract, they cannot be heard to say they were not bound by its terms.

Whether appellees are estopped from proving the real value of the property will depend upon the purposes for which a definite valuation was inserted in the contracts of shipment. Such clauses are intended to secure the basis for calculating freight charges; to apprise the carrier of the degree of care and vigilance necessary for the safe transportation of the property; to establish a convenient measure of the damages recoverable, so that evidence of such damage, in case of total loss, shall be dispensed with; and to protect the carrier from fanciful overvaluations asserted after the property is damaged or destroyed. *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *Johnstone v. Richmond R. R. Co.* (S. C.) 17 S. E. 512; *Durgin v. American Express Co.* (N. H.) 20 Atl. 328, 9 L. R. A. 453, 455; *The Hadji* (D. C.) 18 Fed. 459. If the valuation is fairly and reasonably made, it will be upheld as fixing the largest

amount which the carrier is answerable in damages. *Rosenfeld v. Peoria Ry. Co.*, 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; *L. & N. R. R. v. Oden*, 80 Ala. 38; *Harvey v. T. H. & I. R. R. Co.*, 74 Mo. 538; *Zouch v. Ry. Co. (W. Va.)* 15 S. E. 185, 17 L. R. A. 116. Here the appellant limited the maximum damages to \$2,100 per car load, and received freight charges calculated upon that basis. The company does not even suggest that by reason of fraudulent concealment of the true value of the horses it was misled respecting the degree of care required for their safe carriage, or that, if the actual value had been stated, the property probably would not have been injured; and it is adequately protected from fanciful overvaluation, since, under these contracts, there never could be a greater recovery than the limit of \$2,100 for each car lot. Hence every legitimate purpose of the restricted liability clause applicable to this controversy is fully subserved if the appellees are forbidden in case of partial loss to recover more than the agreed valuation. Accordingly, it is not perceived why, as the appellant contends, the appellees are estopped to show the real value of the property as a factor in determining the amount recoverable, if thereby none of the purposes of the limitation clause is violated. In the leading case of *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, at pages 340 and 341, 5 Sup. Ct. 156, 28 L. Ed. 717, the court uses language which appears to support the appellant's position; the expression being: "The shipper is estopped from saying the value is greater [than the amount declared]. The articles have no greater value for the purposes of the contract of transportation between the parties to that contract;" and similar statements occur in opinions of other courts. See *Richmond v. Payne (Va.)* 10 S. E. 749, 6 L. R. A. 849; *Johnstone v. Richmond R. R. Co. (S. C.)* 17 S. E. 512. But in each of these cases the question involved related to the validity of a limitation contained in the valuation clause, and the respective courts decide that the shipper was prevented by his contract from recovering more than the agreed value. In no instance was the court announcing as an absolute proposition that, when once the shipper has agreed upon a valuation of his property, he is thereafter estopped, under all circumstances, from asserting the real value to be greater; for, if such were the law, a carrier might convert the property, and, when sued for its real value, deny liability except to the amount declared by the owner in the contract of shipment. The estoppel only operates to prevent the shipper from first obtaining the benefit of reduced freight rates based upon a low declared valuation, and then, after loss or injury, seeking to recover the total actual value or damage, though such may far exceed the agreed value.

The next proposition of the appellant, depending upon the doctrine of absolute estoppel, previously invoked, is that,

since the appellees' goods brought their full declared value, there can be no recovery whatever, for there is, under these circumstances, no "actual damage"; and the contract limited recovery to actual damage suffered, which must be construed to mean the depreciation, if any, under the declared value occasioned by the carrier's negligence. This view finds support in certain decisions of the federal courts, notably, *The Lydian Monarch* (D. C.) 23 Fed. 298; *Pearse v. Quebec S. S. Co.* (D. C.) 24 Fed. 285; *The Styria* (D. C.) 95 Fed. 698; *Jennings v. Smith*, 106 Fed. 139, 45 C. C. A. 249. We are not satisfied that these cases announce the correct rule for the assessment of damages. It is a startling doctrine if a carrier, who has chanced to receive costly goods at a small declared valuation, may with perfect impunity negligently cause their depreciation to any extent whatever, so long as he leaves a remnant of them of sufficient actual value to equal their declared worth; and it would seem that such a doctrine, if at all sound, might logically be extended to hold that, even though he willfully appropriated a portion of the goods, he could do so without liability if he left enough to satisfy the appraisal contained in the contract. The language employed in another connection in *Pearse v. Quebec Steamship Co.* (D. C.) 24 Fed. 285, at page 288, is applicable: "If the construction contended for by the claimants were the proper meaning of this liability clause, it would be void upon grounds of public policy, as unreasonable, and as affording a direct encouragement to the theft or nondelivery of the shipper's goods; for on every shipment, whether there was a loss or not, the carrier might, without accountability, appropriate to his own use enough of the owner's goods to reduce the aggregate value of what remained in the foreign market to the invoice value of the whole—a result destructive of all commerce, because enabling the carrier to appropriate all its profits." We conclude, therefore, the appellees were not estopped by the mere execution of a contract declaring the value of their horses to be \$75 each from showing their real value, provided the maximum liability of the appellant was not sought to be increased by such proof above the sum named in the agreements of shipment.

It does not follow that the appellees may here recover to the full limit of the appellant's stipulated liability by showing that the difference between the true value of the animals if sound and the net proceeds from their sale is a sum equal to the largest amount for which the appellant agreed to be liable. The contract, it is true, expressly provided that the appellant would answer to the extent of actual damages, not to exceed \$2,100 per car load; and in *Brown v. Cunard Steamship Co.*, 147 Mass. 58, 16 N. E. 717, *Starnes v. Louisville Co.*, 91 Tenn. 516, 19 S. W. 675, and *Nelson v. Great Northern Ry. Co.* (Mont.) 72 Pac. 642, 9 R. R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311, it was held that

there might be a recovery, even in case of partial loss, up to the agreed limit of liability, irrespective of the value of the goods in their damaged condition or the amount ultimately realized from their sale; but this view does not commend itself to our minds. It is unreasonable to suppose that the carrier agreed to pay the full measure of the damages recoverable in case of a total loss, when the loss was only partial.

It was certainly contemplated by both parties that the amount of recovery should vary in case a horse was killed outright and in the event that only an eye was injured. When the parties agreed upon a valuation, it may fairly be said that they each assumed a portion of the risk of injury in case of a total or partial loss. The carrier's liability was fixed, not arbitrarily by the appellant, but in a sum mutually agreed upon as the largest amount which he would be called upon to pay in any event. The liability of the shipper was equally well understood, though not expressed, to be the difference, if any existed, between the value so declared by the shipper and the actual value of the goods. If a total loss occurred, both were to bear the burden in these respective amounts; the carrier responding to the full extent of his agreed liability, and the shipper losing the difference between the value he placed upon the goods and the value they really possessed. If the loss should be partial, it is only just that the parties should bear it in proportion to their several express or implied liabilities. Hence the true method of ascertaining the damages would be to throw upon the carrier such a proportion of the real loss as the declared value bears to the actual value; that is to say, as the declared value of the injured property is to its actual value, so the amount of recoverable damages is to the amount of the real loss. Such is the method adopted in marine insurance to ascertain the proportions in which the insurer and the insured shall sustain a partial loss under a valued policy. The same rule, though in different terms, is stated by the Supreme Court of the United States as follows in *London Assurance v. Companhia De Moagens Do Barreiro*, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113: "The damaged goods, upon reaching their destination, must be at once sold for the best price that can be had. It is then to be determined what the goods must have been worth in the same market had they been sound, and the difference between the sound value and the proceeds of the sale of the damaged articles gives the ratio of deterioration, and the underwriter is to pay this ratio or percentage of loss on the policy value." The above mode of determining the damages recoverable upon a partial loss appears to be recognized in *Goodman v. M. K. & T. Ry. Co.*, 71 Mo. App. 460, at page 463, where the court says: "By the terms of the special contract shown in this case the plaintiff could not have recovered, if there had been a total loss of any article of furniture, more than \$5 per one hundred pounds.

It is clear that for a partial loss of such article he should not recover on a basis of the actual value of the goods, but only the *proportionate value* [our italics] fixed by the contract, and so the trial court instructed the jury. But the jury seems not to have heeded such instruction. The evidence in plaintiff's behalf tended to show the actual loss or damage to the goods, without reference to the limit fixed by the contract, and the verdict shows that he was permitted to recover the actual amount of damages without reference to a proportionate reduction made necessary by the contract." In *St. L. I. M. & S. Ry. Co. v. Lesser*, 46 Ark. 236, at page 243, the court, in a case similar to the present, held that the following instruction should have been given: "For a partial loss the measure of damages is, what proportion of \$100 [the declared value] said horse was lessened in value by reason of the injury." The contract in that case provided for the payment of \$100 in case of total loss, and that "in case of injury or partial loss the amount of damages claimed shall not exceed the same proportion." Adopting this method of apportioning the loss, upon the first shipment of May 23, 1901, the actual value of the 28 horses was \$4,760; their declared value \$2,100. The net amount realized from the sale of said 28 horses was \$2,721.76. The actual loss was therefore \$2,038.24, and of this the appellant is answerable in the amount of \$899.22, interest to be added. Upon the second shipment of June 13, 1901, the actual value of the 28 horses shipped was \$4,760; their declared value \$2,100. The net amount realized from the sale of said 28 horses was \$3,322.70. The actual loss was therefore \$1,437.30, of which amount the appellant is answerable in the sum of \$634.10, interest to be added—making, with the loss on the first shipment, a total of \$1,533.32, with interest.

A careful reading of the shipping contract satisfies us that the valuation of \$75 each, placed upon the horses, was exclusively for the purpose of determining the charge or rate of shipment; while the valuation of \$2,100 on the whole lot or car load was intended to fix the basis of the liability of the carrier in case of damage or loss. Had there been a valuation of each horse as a basis of such liability, a different question would have been presented.

The judgment is reversed, with instructions to the trial court to restate its conclusions of law numbered 3 and 5 in accordance with this opinion, and for further proceedings not inconsistent herewith.

HADLEY and GILLET, JJ., dissent.

HELM *v.* MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, Division No. 1, Nov. 23, 1904.)

[84 S. W. Rep. 5.]

Death of Section Hand Struck by Train—Negligence—Speed.

In an action against a railroad company for the death of a section hand, who was struck by a train, evidence examined, and *held*, that the surroundings and circumstances were not such as to make a speed of 18 to 20 miles an hour negligence per se.

Same—Right to Presume That He Will Keep Out of Danger.*

Where trainmen see a section hand near the track, but not in a position of peril at the time, they may assume that he will not do anything thereafter toward placing himself in a position of danger, and are therefore not required to stop the train or check the speed.

Same—Speed of Train—Sufficiency of Evidence.

In an action against a railroad for the death of a section hand, who was struck by a train, evidence examined, and *held* insufficient to show that the train was running at a speed of 18 or 20 miles an hour when it struck deceased, as testified to by witnesses for plaintiff.

Same—Negligence—Sufficiency of Evidence.

In an action against a railroad for the death of a section hand, resulting from being struck by a train, and alleged to have been caused by the defendant negligently, carelessly, and unskillfully failing to stop the train in time to avoid the injury, after the defendant knew, or by the exercise of ordinary care could have known, of the peril of the deceased, evidence examined, and *held* insufficient to show any negligence on the part of the defendant.

Appeal from Circuit Court, Jackson County; John W. Henry, Judge.

Action by Josie Helm against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Elijah Robinson, for appellant.

Frank P. Walsh, Porterfield, Sawyer & Conrad, and R. J. Ingraham, for respondent.

MARSHALL, J. This is an action under the statute for \$5,000 damages, caused by the killing of the plaintiff's husband by a regular passenger train at a point in Kansas City where the defendant's tracks cross Lydia avenue, about 9 o'clock a. m. on August 26, 1899. The plaintiff recovered a judgment for \$5,000, and the defendant appealed.

The petition charges three acts of negligence on the part of the defendant, to wit: First, a violation of the railroad speed ordinance of the city, which made a greater rate of speed than six miles an hour a misdemeanor punishable by a fine, and the acceptance thereof by the defendant in consideration of a grant by the city of a right to construct a switch track on Front street; second, common-law negligence in run-

*See generally, foot-note appended to *Simpson v. Rhode Island Co.* (R. I.), 12 R. R. R. 642, 35 Am. & Eng. R. Cas., N. S., 642; foot-note appended to *Clegg v. Southern Ry. Co.* (N. Car.), 11 R. R. R. 737, 34 Am. & Eng. R. Cas., N. S., 737.

Helm v. Missouri Pac. Ry. Co

ning the train in a populous part of the city "at a rate of speed which, under the surroundings and circumstances, was negligent and dangerous"; and, third, so negligently, carelessly, and unskillfully running the train as to run over the deceased, after it knew, or by the exercise of ordinary care could have known, of the peril to which he was exposed, and in not stopping the train after it knew, or could have so known, of such peril in time to have avoided the injury. There was no such speed ordinance, or acceptance thereof, attempted to be shown, nor was the case tried upon the theory of the plaintiff's right to recover on account of a violation thereof. So that nothing further need be said as to the first averment of negligence. The answer admits that plaintiff was the wife of the deceased, and admits the killing, but denies that the defendant was guilty of any negligence, alleges contributory negligence on the part of the deceased, and concludes with a general denial of all allegations of the petition that are not admitted to be true.

The facts developed upon the trial are these: The railroad runs east and west, and Lydia avenue runs north and south. For a distance of 600 feet west of Lydia avenue the track is straight and level, and there is nothing to obstruct the view. The deceased was a section hand in the employ of the defendant, was 43 years of age and possessed of all his faculties, and had been working as a section hand for about 4 months. About 7 o'clock of the morning of the accident the deceased went to the place of the accident on a hand car with the section gang to repair the track. They unloaded their picks and shovels and tools and a water keg from the hand car onto the ground south of the track and just west of Lydia avenue. There was a telegraph pole about 6 feet south of the track, and they placed the water keg just west of the telegraph pole, and left some picks, shovels, and tools lying on the ground between the telegraph pole and the track. They then went to work repairing the track just east of Lydia avenue. The east-bound passenger train was due to pass that point about 9 o'clock. About that time the deceased left the place at which he was working and went across Lydia avenue and to the water keg to get a drink of water. In so doing his face was turned towards the west in the direction from which the train was to come. He reached the water keg, got a drink of water, put the top on the keg, and placed the cup on the top of the lid. The train was composed of an engine, a mail car, a baggage car, and two coaches, and was equipped with air brakes. These facts are conceded to be true by both parties. What happened after this is the subject of controversy here. The plaintiff called three witnesses who saw the accident, to wit, James W. Havens, Mack McConnell, and Vaughan. The first, Havens, was 150 feet east of the place of the accident. The second, McConnell, was on top of the hill, south and east of Lydia

avenue, and was 250 feet distant from the place of the accident. The third, Vaughan, was standing at a window of the Gille Hardware Company, at First and Lydia avenues, which was from 250 to 300 feet from the place of accident. They all say that after the deceased had taken a drink of water he staggered or stumbled, and his feet seemed to get "tangled" up with the tools, and he was trying to move and could not. Havens says that, when the deceased got so "tangled up" with the tools, the train was from 200 to 600 feet from him. He stated both distances at different times in the course of his examination. Later, on being recalled for further cross-examination, this witness, identified a written statement he had made just after the accident in which he testified as follows: "All I know about it is that I used to work at that furniture factory at First and Lydia, and had been laid off for want of material to work with, and had been down to Sheffield, Mo., and was returning up the track, and the train was coming out, and I seen it strike the man. I was about 150 or 200 feet east of Lydia avenue when I saw the man struck. He was west of the crossing when he was struck. Q. Where was this man when you first saw him? A. He was just straightening up from the water keg that was there, and seemed as though he got his feet tangled up in some of the shovels that were laying there. When he went to turn around from the keg, he got his feet tangled up in those shovels, and as he went to turn around the train was right there, and he fell right over in front of the train, and was struck and carried across on the other side of the crossing. Q. Did he throw up his hands when he went to fall? A. Not that I noticed. He pitched forward toward the train. Q. When you first saw him there at the water keg, was he facing the train? A. Yes, sir." McConnell says the train was 300 feet from the deceased when he became so tangled with the tools; and Vaughan placed the distance at 250 feet. They all say that deceased was then 5 or 6 feet south of the track, was struggling to free his feet and could not, and that as the pilot of the engine came opposite to him he "pitched" or fell sideways against it, and was carried on the pilot about 50 feet and thrown off, and was injured so that he died.

The defendant called four eyewitnesses to the accident, to wit, Patrick Conner, the engineer, Frank Farrell, the fireman on the engine, Patrick Naughton, the flagman at the Lydia avenue crossing, and Morris Sullivan, a section hand who was working on the repair of the track with the deceased. Conner testified: That he was on the right hand side of his engine, and saw the deceased when he was about 300 feet from him. That he was then in the act of taking a drink of water from the keg, and was facing the train. That he was then about 6 or 7 feet from the track. That when the train got within 10 or 15 feet of him he began to stagger back towards the train. That he immediately began to blow the

whistle and to set the air brakes, and did all he could to stop the train; but that he fell against the pilot on the front of the engine and was killed. That he had before that whistled for the Belt Line crossing, and had whistled for the dirt road crossing at the Bolen coal yard, which was 600 feet distant. That he had slowed up at the Belt Line crossing, which was 1,200 feet distant, for the signal as to whether he should stop or go ahead. That after passing the Bolen coal yard he had whistled for the Lydia avenue crossing, and had received the signal from the flagman to come on, and had whistled off brakes. That he stopped the train in about three car lengths, which would be from 120 to 135 feet, after the deceased fell against the pilot. That from the time he first saw him until the engine got within 10 or 15 feet of the deceased he was standing by the water keg and was in a place of safety, and he saw nothing about him different from the ordinary section hand; but that when the engine got within 10 or 15 feet of him the deceased "threw up his hands and stumbled like something was wrong, and just stumbled right up against the track and right up against the bumping beam.

* * * I thought there was something wrong with him; taken with some ailment or other. He kept stumbling back." That the train was running from 6 to 8 miles an hour. Patrick Naughton, the flagman, was at the Lydia avenue crossing. He corroborated the engineer as to the whistles. He says he noticed the section hands at the Lydia avenue crossing, and saw one man at the water keg; that the latter started to turn around, and stumbled, and threw up his hands, and fell against the pilot beam on the engine; that he could not tell exactly how close the engine was to the deceased when he commenced to turn around from the water keg, but it was not further than across the courtroom; that when the train was at the Bolen coal yard, 600 feet away, he signaled for it to come on, and then took 11 steps, and then he heard a whistle, and he looked and saw the deceased stumbling as aforesaid. Frank Farrell, the fireman, said he was on the left-hand side of the engine. He corroborated the engineer as to the whistling of the engine and as to the signals from the flagman; that he was sitting on the seat in the engine looking towards the east and ringing the bell; that he did not notice the man at the water keg, it being on the other side of the engine from him; that the track was clear ahead of him; that when the engine was about 30 feet west of Lydia avenue, the engineer began "tooting" the whistle and applied the air brakes; that the train ran about 175 feet before it was stopped; that the train was running from 7 to 8 miles an hour immediately before the accident. Morris Sullivan, a section hand, was at the hand car about 90 feet east of the Lydia avenue crossing, and 6 or 8 feet north of the track. He said that deceased had taken a drink of water and started east towards the hand car to help load it with cross-

ties; that he heard a "warning whistle," and looked around, and saw that the engine was within 10 or 15 feet of the deceased; that deceased was about 10 feet east of the water keg, and seemed to be standing still; that the engine then came between him and deceased, and he did not see what happened afterwards; that there were "a few tools—picks and shovels—around there."

On behalf of the plaintiff, Havens testified that in his judgment the train was running at the rate of from 18 to 20 miles an hour. He had no experience in such matters, except riding on a train. He testified that he did not hear any whistle, but that his attention was directed towards the train by the remark of some one that the train was coming. McConnell, a witness for the plaintiff, testified that he had worked on railroads off and on for 12 or 15 years, and that in his opinion the train was running from 18 to 20 miles an hour. Vaughan, a witness for plaintiff, testified that he could not approximate how fast a train is running. Frank A. Stamples, a witness for the plaintiff, testified that he was a conductor in the employ of the defendant. He described the character of the train in question, being as hereinbefore stated, and said he took the names of all the persons who were around there at the time of the accident, and that McConnell was not there. William J. Mathis, a witness for the plaintiff, testified that he was a stationary engineer; had been a locomotive engineer and a fireman, and had worked on a locomotive engine, other than as an engineer, for 9 or 10 years; had had no experience as an engineer on passenger trains, but had "fired" on passenger trains "considerably." He said a train of the character of this train, when running at 18 miles an hour, could be safely stopped "in the length of itself," which he said was 250 feet; and if it was running at the rate of 6 or 7 miles an hour it could be stopped in 40 or 50 feet.

John W. Balbridge, a witness for the defendant, testified that he was a locomotive engineer, and that he had been running a passenger train for 27 years; that a train like this one, when running at the rate of 18 miles an hour, could be stopped in from 540 to 600 feet; and that, when running at a speed of 6 or 8 miles an hour, it can be stopped in 140 feet. Peter Helm, a witness for the defendant, testified that he was a locomotive engineer, and had been running an engine on the defendant's road for 19 years. He said that a train like this, when running 6 or 8 miles an hour, could be stopped in about 150 to 200 feet, and, if running at 18 miles an hour, it could be stopped in between 400 and 500 feet.

At the close of the plaintiff's case, and again at the close of the whole case, the defendant demurred to the evidence. The court overruled the demurrers, and the defendant excepted. The case was submitted to the jury upon instructions which are challenged here, but in view of what is here-

Helm v. Missouri Pac. Ry. Co

inafter said it is not necessary to set them out here. The jury returned a verdict for the plaintiff for \$5,000, and the defendant appealed.

The chief error assigned here is the refusal of the trial court to direct a verdict for the defendant. Two acts of negligence are assigned by the plaintiff as ground for a recovery: First, common-law negligence in running the train at a dangerous rate of speed "under the surroundings and circumstances"; and, second, "negligently, carelessly, and unskillfully" failing to stop the train in time to avoid the injury, after the defendant knew, or by the exercise of ordinary care it could have known, of the peril of the deceased.

Of the first assignment of negligence it is only necessary to say: First. "The surroundings and circumstances" were not such as to make a rate of speed of 18 or 20 miles an hour negligence in itself, in respect to the duty of the defendant to its section hand engaged in the business of repairing the track. Second. There is no substantial evidence in the case that the train was running 18 or 20 miles an hour, and the physical facts show this could not have been true. On behalf of the plaintiff there were only two witnesses who testified that the train was running 18 or 20 miles an hour, and both of these were from 250 to 300 feet east of the place of accident, and the train was approaching them. Havens did not qualify himself to give an opinion on the subject, and had had no experience with trains, except to ride on them; and McConnell was a common laborer, and only attempted to qualify himself to express an opinion by saying he had "been on the road, off and on, for I would think 12 or 15 years," although in what capacity he did not state, nor, in fact, did he even say he had worked on the road—simply that he had "been on the road," and that "I think that I have a pretty good opinion of it." The uncontradicted testimony is that the train checked up at the Belt Line crossing, which was about 1,200 feet west of the place of accident, and in that space it could not reasonably be said that it had attained a speed of 18 or 20 miles an hour after so having checked up. Third. In view of what is hereinafter said, the speed of the train is wholly immaterial in this case.

The second act of negligence assigned is the vital question in this case. The necessary, underlying postulate as to this charge is that the deceased was in a place of peril, and the next ingredient necessary to a recovery is that the defendant knew, or by the exercise of ordinary care could have known, that he was in peril, in time to have stopped the train and avoid the injury. There is no controversy in the case that the deceased was a section hand in the employ of the defendant, nor that, when the train was from 200 to 600 feet from him, he was standing at the water keg, at a distance of at least 6 feet south of the track. There can be no doubt

in the mind of any one that while in that position he was not in a place of peril. The trainmen, therefore, had a right to assume that he would remain in that safe position, and would not do anything towards thereafter placing himself in a position of danger, and hence were not required to stop the train or check the speed. *Shark v. Railroad*, 161 Mo. 214, 61 S. W. 829; *Guver v. Railroad*, 174 Mo. 344, 73 S. W. 584; *Zumault v. Railroad*, 175 Mo. 288, 74 S. W. 1015; *Carrier v. Railroad*, 175 Mo. 470, 74 S. W. 1002; *Evans v. Railroad*, 178 Mo. 508, 77 S. W. 515. In *Evans v. Railroad*, supra, Burgess, J., speaking for the court, said: "But plaintiff claims that, even if deceased was guilty of negligence, yet if defendant's employees in charge of the train became aware of his peril, or might by the exercise of ordinary care have become aware of it, in time to have enabled them by the exercise of ordinary care to have averted the injury, and they failed to exercise such care, plaintiff was entitled to recover. It will not do to apply this rule in all of its strictness to section men whose business it is to work upon and keep in repair railroad tracks; for they are supposed to look after their own personal safety, and to know of the time at which trains pass, to look for them and see them, and to move out of the way. It is of common knowledge that these men often voluntarily wait until trains get dangerously close to them, and then step out of danger and let them pass by, and to require trains to stop upon all such occasions, when section men are discovered at work on the track, would not only be imposing upon railroads unjust burdens, but would greatly interfere with traffic and travel. Those in charge of trains have the right to presume in the first place that such persons will keep out of danger, and not until they have good reason to believe they will not do so, and then fail to use all proper means at their command to prevent injuring them, in consequence of which they are injured, or are injured by reason of the wilful negligence of those in charge of the train, should the defendant be held liable, and there was nothing of that kind in this case. Our conclusion is that the demurrer to the evidence interposed by defendant should have been sustained."

Giving the fullest possible effect to the testimony of the plaintiff's witnesses, and the result is that the deceased was in a place of safety; that after taking a drink of water he started to turn around, and his feet seemed to become "tangled up" with some tools that were lying on the ground; and that he staggered backwards, and just as the pilot of the engine got opposite to him he "pitched over sideways" and fell against the pilot. Assuming, as plaintiff's witnesses say, that the train was from 200 to 600 feet distant when he became so "tangled up," he was still in a place of safety. He was not on the track, or so close to it as to be struck by the passing train. If he could not move, all he would have

had to do was to be still until the train passed him, and he could then have extricated himself at his leisure. A person of the slightest prudence would have done that. But, assuming that he persisted in struggling to free himself from the tenacious tools that imprisoned his feet, the engineer saw that he was not on the track and was in a safe position, and would not be hurt by the passing train, whether the train was running at 20 miles an hour or only at 6 miles an hour. The engineer could not be charged with the duty of foreknowing that in his struggles he would be "pitched over sideways," so as to strike the pilot on the engine. Consequently the engineer was under no obligation to stop the train or slow its speed at that time. If the testimony of the plaintiff's witnesses as to the rate of speed that the train was moving, to wit, 18 or 20 miles an hour, could be accepted as correct, it would be traveling 30 feet a second, and at this rate it could travel 200 feet in 6½ seconds, or it would travel 600 feet in 20 seconds. The result is that, even on this hypothesis, the plaintiff was in a place of safety up to a period of time varying from 6½ seconds to 20 seconds before the injury occurred. In fact, however, he never was in a place of peril until he commenced to "pitch" sideways towards the track. If he had "pitched" forward or backward, he would never have been in a position of peril. The plaintiff's case, therefore, requires the court to hold that the engineer should have known that the deceased would so struggle or stagger that he would "pitch sideways" towards the track, and not forward or backward; for there is no controversy that, between the time he began to "pitch sideways" and the time he struck the train, there was not time enough to have stopped the train and avoid the injury. The physics of the case also show this to be true; for it certainly would not take 6½ or 20 seconds for a man to fall down after he commenced to "pitch sideways."

This is all upon the theory that the testimony of the plaintiff's witnesses is absolutely true. They were from 200 to 300 feet away from the place of the accident, and were mere casual observers. The testimony of the engineer and of the flagman is that the deceased was not in a place of peril, and did not commence to stagger towards the train until the engine was within from 10 to 30 feet of him, and then the engineer sounded the warning whistle, applied the air brakes, and stopped the train in about 120 to 135 feet, which fact tends to show that it must have been running at a less rate of speed than 18 or 20 miles an hour; for, if it was running at that rate, a stop made in about 4 seconds would be hazardous to the safety of the passengers on the train. Upon the case made, therefore, it is apparent that the humanitarian doctrine has no application. There is no evidence or charge of any wantonness on the part of the trainmen, and nothing from which an inference of intentional suicide on the part of the

Pierson v. Chicago & N. W. Ry. Co

deceased can be drawn. It was, therefore, an unforeseen accident, which could not have been anticipated or avoided. There was no negligence on the part of the defendant shown, and hence the defendant is not liable.

The trial court should have directed a verdict for the defendant. The judgment is therefore reversed, and, as no good could come of a trial anew, the cause is not remanded. All concur, except ROBINSON, J., absent.

PIERSON v. CHICAGO & N. W. RY. CO.

(Supreme Court of Iowa, Jan. 16, 1905.)

[102 N. W. Rep. 149.]

Injury to Brakeman—Defective Foot Guard—Negligence—Question for Jury.*

In an action against a railroad for injuries to a brakeman from alleged defective foot guards at a switch, evidence examined, and whether defendant was negligent *held* a question for the jury.

Same—Same—Assumption of Risk.†

A railroad brakeman does not assume the risk of a defect in the blocking at a switch in the absence of knowledge of the defect.

Same—Same—Contributory Negligence.

In an action against a railroad for injuries to a brakeman, whether he was guilty of contributory negligence *held* a question for the jury.

Same—Contributory Negligence—Emergency—Evidence—Custom.

Where the question is whether, in a particular emergency, an employee was negligent in the method pursued by him in rendering a service, the general custom or usage as to the method of rendering such service may be shown.

Same—Same—Same.

In an action against a railroad for injury to a brakeman, where it appeared that he was injured by stepping between the cars inside the rail while the engine was in motion to uncouple, evidence was admissible to show that when he entered the employ of the defendant he was directed to go with a train crew and see how they performed their work, and to govern himself accordingly, and that on such instruction trip the brakeman, under circumstances similar to those which confronted him at the time of his injury, did the same as he did on that occasion.

Appeal from District Court, Linn County; J. H. Preston, Judge.

Action by plaintiff, as assignee of N. F. Harrington, to recover damages for personal injuries received by him while in defendant's employ as brakeman, resulting, as alleged, from the negligence of defendant in failing to place proper and sufficient foot guards or blocks between the main rail and the guard rail of its track at a switch; the result of the defect being that Harrington's foot was caught between the rails while he was attempting to uncouple freight cars in

*See foot-note appended to Ray v. Vicksburg, S. & P. Ry. Co. (La.), 12 R. R. R. 704, 35 Am. & Eng. R. Cas., N. S., 704.

†See foot-notes appended to Kansas City, etc., R. Co. v. Filipo (Ala.), 12 R. R. R. 486, 35 Am. & Eng. R. Cas., N. S., 486.

motion, and that his foot and ankle were run over and injured so that amputation of his leg above the ankle became necessary. Verdict for plaintiff for \$7,500, and from judgment thereon defendant appeals. Affirmed.

James C. Davis, for appellant.

Rickel, Crocker & Tourtellot, for appellee.

McCLAIN, J. At the time of the accident, Harrington, in the discharge of his duties as brakeman in the employ of defendant, was engaged in attempting to uncouple from the engine two freight cars which were being kicked upon a side track at the station of Wright, on a branch line of defendant's railroad, between Belle Plaine and Muchakinock. The engine and cars were provided with safety appliances for coupling and uncoupling, by means of which it was intended that a brakeman, in such operation, need not step inside the rails. A part of the appliance consisted of a rod across the end of the car, connected with the coupling pin, and provided at the outside end with a handle, by the use of which the coupling pin could be raised. The rod on the rear of the tender extended clear across, and was provided with a handle or lever at each end, so that it could be operated from either side; but the rods on the cars extended to only one side, being so arranged that, whatever way the car was being operated, there would be a lever or handle on the right-hand side of the forward end of the car. The engine and cars in question were being backed westward on a side track which was north of the main track, and Harrington, after turning the switch so as to throw the cars on the side track—the switch stand being also on the north side of the main track—waited until the engine and cars had been backed far enough, so that the coupling between the tender and the adjacent car was about opposite the switch stand, when he attempted to uncouple the cars from the tender by raising the lever of the coupling appliance attached to the tender. For some reason not explained in the evidence, this appliance failed to work, and Harrington was unable by the use of it to raise the coupling pin out of the socket so as to release the cars from the tender. He thereupon communicated to the engineer, through the fireman, a signal to stop; and, after the engine and cars had been brought to a standstill, he gave another signal, indicating that he desired the engine to be again put in motion slowly backward, and at the same time stepped between the tender and cars, and attempted to raise with his left hand the pin in the coupler attached to the freight car. While thus engaged, walking between the tender and the car, inside the rail, as the evidence tends to show, his foot became caught between the guard rail and the main rail; and, in attempting to throw himself from between the car and the tender, and outside of the rail, his foot, which had in some way been loosened, was caught under the wheels of the tender, and crushed.

The questions involved in the case relate to the negligence of the company, the assumption of risk by Harrington, and Harrington's contributory negligence, and the case may be most conveniently disposed of by considering the questions raised as to each of these elements.

1. It is contended for appellant that there was no evidence of negligence on its part as to the condition of the blocking between the guard rail and the main rail, and that there was no defect in such blocking which could be attributed to defendant as constituting a fault. But the evidence tends to show that the blocking in the main rail (that is, the block of wood fitted in below the ball of the rail, and intended to make the space between such blocking on the main rail and a similar blocking on the guard rail as narrow as the space between the balls of the two rails, so that a person's foot could not be caught under the ball of either rail) was defective, in that it did not come out as far as the end of the blocking of the guard rail, and also in that it did not come up flush with the ball of the rail, and left a small space, in which the sole of a shoe might be caught, and also that in the blocking at the side of the guard rail was a groove or crack which also furnished an opportunity for the sole of a shoe to become caught; the combined result of these defects being that a person's foot might be caught and held between the rails, so that it could not be extricated without drawing it backward—the very danger which the blocking of the rails was intended to prevent. Whether these defects, which it appears had existed for such length of time that the company was chargeable with knowledge thereof, were of such nature that their existence constituted negligence, was clearly a question for the jury. The court cannot say, as a matter of law, that, in the exercise of reasonable diligence, the company should not have so blocked these rails that Harrington's foot would not have become so firmly caught therein that he could not draw it out without pulling it backward; nor can we say that a space of a fourth of an inch between the ball of the main rail and the blocking, or a groove a quarter of an inch deep in the blocking of the guard rail, was so minute and insignificant a defect that its existence should not have been noticed by the defendant in the discharge of its duty to furnish a safe track for the use of its employees, and removed, or the danger therefrom in some way obviated, nor that it was not negligence on the part of the defendant to originally so arrange this blocking that such defects should exist. We are clear that, as to the negligence of the defendant, the evidence made a case to go to the jury.

2. As to assumption of risk, there is no evidence whatever that Harrington had actual knowledge, or could be chargeable with knowledge, of the defect in this particular blocking. He had had occasion only two or three times to engage in coupling or uncoupling cars at this station, and there is no

evidence that he had been so engaged at this particular switch—much less, that he had had occasion to notice the condition of this blocking. It cannot be reasonably contended that a brakeman engaged in discharging his duties over a long line of road must inform himself, at his peril, of the condition of the blocking at each switch on the line, and it is not in any way shown that he had any actual knowledge of this particular defect. *Trott v. Chicago, R. I. & P. R. Co.*, 115 Iowa, 80, 86 N. W. 33, 87 N. W. 722. It is argued for appellant that Harrington was charged with knowledge that there was more or less danger necessarily incident to guard rails, and that he assumed the risk of such danger. Let this be conceded. Nevertheless he did not assume the risk of a defective blocking, unless he was in some way charged with knowledge thereof; and the evidence tends to show that his injury did not result from stumbling over or striking his foot against the rail or blocking, as he had reason to assume that it existed, but from catching his foot in a defective blocking, of which he was not charged with knowledge. The argument that Harrington should have avoided the danger incident to the guard rail, if conceded to be sound, would lead to the result that an entire failure to block, or a faulty blocking, no matter how defective, would not be ground of complaint, even though the employee had no knowledge in the particular case of the failure or defect.

3. The principal controversy in this case is as to whether Harrington was guilty of contributory negligence in the method adopted for uncoupling the car from the tender of the engine. It is argued for appellant that, as the tender and the car next to it were provided with automatic couplers for the purpose of enabling employees to make the uncoupling without going between the cars, it was contributory negligence on the part of Harrington to step between the tender and car, inside the rail, while the engine was in motion, for the purpose of pulling the pin. We think it ought to be fully conceded, in view of the federal and state legislation requiring railroads to equip their cars and engines with automatic couplers, that it would be contributory negligence on the part of an employee to ignore the safety appliance provided, where it could reasonably be used, and resort to the method formerly in use, confessedly more dangerous, of stepping between moving cars, within the rail, for the purpose of making an uncoupling. *Morris v. Duluth, S. S. & A. R. Co.*, 108 Fed. 747, 47 C. C. A. 661; *Gilbert v. Burlington, C. R. & N. R. Co.*, 128 Fed. 529, 63 C. C. A. 27. But it appears from the evidence that Harrington found that the automatic appliance on the tender, which was the only one within his reach as he attempted to uncouple the car from the tender on the north side, would not work, and it thereupon became necessary for him to exercise the reasonable judgment of a prudent man as to how the uncoupling should

be effected; and it is not claimed by counsel, nor would it be reasonable to argue, that Harrington would have been justified in refusing to uncouple the cars in any other manner than by the use of the safety appliance, necessitating the delay of the train until the difficulty in the use of the appliance could be discovered, and it could be made to work. The contention of counsel is that three or four different ways, all of them less dangerous than stepping inside of the rail while the engine was in motion to pull the pin, might have been resorted to by Harrington; and it is true that the witnesses for the defendant testify that these different ways would have been safe, and were available. They say that Harrington, before signaling the engineer to back up the engine, might have crawled under the cars to the other side, and used the coupling device on the freight car, or might have gone around the engine to the other side for that purpose, or might, by an intricate set of maneuvers, not necessary to explain, have got the cars separated by means of pulling the pin and opening the coupling hooks before the cars were kicked back. It is conceded, however, that it was impracticable to uncouple the car by means of pulling the pin by hand while the engine was standing still, for the arrangement of the automatic coupling device is such that the pin can be raised and the cars effectually uncoupled only while in motion, whether the uncoupling is done by the use of the handle of the automatic device, or by pulling the pin by hand. It seems to us, therefore, that the only practical method which Harrington could have used for effecting an uncoupling was either to step inside of the rail while the engine was moving, or, by crawling under the coupling or by going around the engine, attempt to make use of the automatic coupler on the car, which would have been available to him on the other side of the track. And let it be noticed here that Harrington was on the usual side when he attempted to make the uncoupling. He was on the side of the track where he had just used the switch, and where he would necessarily again use the switch after the uncoupling had been effected, and the engine had moved forward, ready to back down again on the main track for coupling to the balance of the train.

The concrete question is, then, whether after Harrington had attempted, in a perfectly proper manner, to effect the uncoupling by the safety appliance provided for that purpose, and had been unable to do so, he was, as a matter of law, guilty of contributory negligence in not going to the other side of the train for the purpose of attempting the uncoupling by means of the safety appliance on the car, and, instead of doing so, stepping inside the rail while the engine was in motion for the purpose of pulling the pin by hand. In support of the proposition that Harrington's conduct was, as a matter of law, negligent, counsel rely upon *Morris v. Duluth, S. S. & A. R. Co.*, supra; *Gilbert v. Burlington, C. R. &*

Pierson v. Chicago & N. W. Ry. Co

N. R. Co., supra; Dawson v. Chicago, R. I. & P. R. Co. (C. C. A.) 114 Fed. 870, 52 C. C. A. 286. In the *Morris Case* it is held that where there is a comparatively safe and a more dangerous way known to the servant, by means of which he may discharge his duty, it is negligence for him to select the more dangerous method. The same proposition is repeated in the *Gilbert Case*, in which Sanborn, Circuit Judge, expresses the views of the majority of the Circuit Court of Appeals that the brakeman, finding that the safety device available on the side of the train where he was would not work, was guilty of contributory negligence, as a matter of law, in going between the cars to uncouple them by hand, when he might have effected the uncoupling by going to the other side of the train, and using the safety device there available. It is conceded in the opinion, for the purpose of the case, though not decided, that, where the safety appliance furnished to uncouple cars cannot be made to accomplish that end, it is sometimes necessary for brakemen to go between moving cars to uncouple them, and that, when that necessity exists, it is not negligence for them to pursue this course. But in that case, Thayer, Circuit Judge, expresses himself as not prepared to say that the employee was guilty of negligence because he did not try to lift the coupling by the lever on the opposite side of the train before stepping between the cars, and bases his assent to the conclusion of the other two judges that the brakeman was negligent on the ground that he had not used reasonable means to ascertain whether the coupling device within reach would operate to uncouple the cars before stepping inside the rail to pull the pin by hand. In the *Dawson Case* the question was whether a brakeman was negligent in swinging between a flat car and a box car, while in motion, for the purpose of riding on the brake beam of the flat car, using the handhold provided in accordance with an act of Congress, when he might have made use of the stirrup and handholds on the side of the box car without incurring the risk of swinging in between the cars; and Thayer, Circuit Judge, expressing the views of the majority, finds that the brakeman was, as a matter of law, guilty of contributory negligence, on the ground that it was clearly apparent that he exposed himself to unnecessary risk, while Caldwell, Circuit Judge, dissents on the ground that the rule stated by the majority prescribes a course for brakemen impracticable in practice, and contrary to established usage in such cases; insisting that the question of negligence of the brakeman was, under the circumstances, one for the jury.

We think that, under the decisions of our own court, the question whether, when Harrington found that the safety appliance immediately available to him would not work, he acted as a reasonably prudent man, under the circumstances, in attempting to make the uncoupling by stepping between the rails after the engine was in motion, rather than incur

the additional delay necessary to reach the other side of the train, and try to effect the uncoupling by the appliance on the freight car, was for the jury. We have not recognized any such rule as that it is, in law, negligence to perform a service in the more dangerous of two methods in which it may be performed, regardless of the circumstances under which the employee is called upon to act. On the contrary, we have held that, even where the facts are not in dispute, it should be left to the jury to say whether a course of conduct is negligence, if reasonable men may honestly differ as to the conclusion to be drawn from such undisputed facts. *Bach v. Iowa Central R. Co.*, 112 Iowa, 241, 83 N. W. 959; *Barnhart v. Chicago, M. & St. P. R. Co.*, 97 Iowa, 654, 66 N. W. 902; *Whitsett v. Chicago, R. I. & P. R. Co.*, 67 Iowa, 150, 25 N. W. 104; *Milne v. Walker*, 59 Iowa, 186, 13 N. W. 101. Therefore it was properly left to the jury in this case to say, not simply whether it would have been safer for Harrington to crawl under the coupling, or go around ahead of the engine to the other side of the train, and attempt to uncouple the car by means of the safety appliance, than to attempt to uncouple it by hand, as he did, but whether, under all the circumstances, in view of the necessity for prompt action which is involved in the railway service, he was negligent in adopting the method which he did adopt, even though another might have been safer. *Bucklew v. Central Iowa R. Co.*, 64 Iowa, 603, 21 N. W. 103; *Gibson v. Burlington, C. R. & N. R. Co.*, 107 Iowa, 596, 78 N. W. 190; *Curtis v. Chicago N. W. R. Co.*, 95 Wis. 460, 70 N. W. 665; *Ashman v. Flint & P. M. R. Co.*, 90 Mich. 567, 51 N. W. 645; *Florida Central & P. R. Co. v. Mooney*, 40 Fla. 17, 24 South. 148; *Brinkmeier v. Missouri Pacific R. Co.* (Kan. Sup.) 77 Pac. 586.

It is significant, as bearing on the question of Harrington's exercise of care, that while witnesses testified that it would have been safer to go to the other side of the train, and use the safety appliance there, if it would work, they all agreed that, in their practical experience as railroad men, they never knew of that method being followed or expected under such circumstances; and the witnesses substantially agree that the method pursued by Harrington is the one usually pursued by a brakeman when he is unable to effect the uncoupling by means of the safety appliance immediately at hand. Counsel for appellant insist, however, that the court erred in admitting evidence of this custom on the part of brakemen in defendant's employ, and in allowing the jury to take such custom into account as bearing on Harrington's exercise of due care in this instance, contending that no custom or usage will justify or excuse negligence; and many authorities are cited in support of this general proposition, of which the following are especially relied upon: *Kroy v. Chicago, R. I. & P. R. Co.*, 32 Iowa, 357; *Hamilton v. Des Moines Valley R.*

Pierson v. Chicago & N. W. Ry. Co

Co., 36 Iowa, 31; Muldowney v. Illinois Central R. Co., 36 Iowa, 462; Ferguson v. Central Iowa R. Co., 58 Iowa, 293, 12 N. W. 293. But without stopping to analyze these cases in detail, it is sufficient to say that none of them directly holds that the customary and approved method of performing a service cannot be shown, as bearing on the question whether an employee performing such service in that manner was negligent in so doing. On the other hand, it has been decided in many cases in this and other states that proof of the usual and customary method of performing a service may be received, as bearing on the question of the employee's exercise of reasonable care in following the method indicated by custom and usage. Thus, in *Whitsett v. Chicago, R. I. & P. R. Co.*, 67 Iowa, 150, 25 N. W. 104, it is said, with reference to the action of a brakeman in stepping from a freight car to the tender of the engine in order to dismount from the train by means of the engine steps to operate a switch, instead of dismounting by means of the ladder provided on the freight car: "In the absence of express rule or direction prescribing the particular course he should pursue under the circumstances, he was required to choose between two courses; and if, in making that choice, he adopted the course usually followed under like circumstances by men in that calling, that fact would have a very important bearing upon the question whether he exercised due care in making the choice." With reference to admissibility of evidence of custom or usage in such cases, this court, in *Lowe v. Chicago, St. P., M. & O. R. Co.*, 89 Iowa, 420, 56 N. W. 519, used this language in a case where it was claimed that the acts of an employee constituted contributory negligence, because in violation of the rules of the company, agreed to by him, although in accordance with the usage or custom of other employees under similar circumstances: "There is a conflict in the cases, some of them holding that a usage or custom cannot be shown as against a rule or contract like that under consideration; but we think it is clear that it is competent to show a usage or custom on the part of the employees of defendant at variance with and in violation of such a rule when the defendant has, through its proper officers, knowledge of its violation, and their conduct shows that they acquiesced in such violation." If custom or usage may be shown as justifying a course of conduct which is contrary to the express regulation of the company, certainly it is admissible to show what was the proper or reasonable course of conduct under particular circumstances, in the absence of any regulation. Without further amplification, the following cases may be cited as fully supporting the proposition that where the question is whether, in a particular emergency, the employee was negligent in the method pursued by him in rendering a service, the general custom or usage as to the method of rendering such service may be shown:

Deck v. Baltimore & O. R. Co

Spaulding v. Chicago, St. P. & K. C. R. Co., 98 Iowa, 205, 67 N. W. 227; *Branz v. Omaha & C. B. R. & B. Co.*, 120 Iowa, 406, 94 N. W. 906; *Ashman v. Flint & P. M. R. Co.*, 90 Mich. 567, 51 N. W. 645; *Curtis v. Chicago N. W. R. Co.*, 95 Wis. 460, 70 N. W. 665; *Kane v. Northern Central R. Co.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339; *Hannah v. Connecticut River R. Co.*, 154 Mass. 529, 28 N. E. 682.

Evidence was also admitted, over defendant's objection, tending to show that when Harrington entered its employ, about three years before the accident, he was directed by the superintendent to go with a train crew and see how they performed their work, and to govern himself accordingly in discharging his duties as brakeman, and that on this instruction trip the brakeman, under circumstances similar to those which confronted Harrington at the time of this accident, went between the cars inside the rail, while the engine was in motion, to effect an uncoupling, instead of waiting to go around to the other side of the train. Certainly, if defendant saw fit to instruct Harrington that it was proper to uncouple cars in this manner, under the circumstances, rather than incur the delay necessarily incident to going to the other side of the train, he was justified in assuming that this was the method of procedure required of him. True, he assumed the risks incident to this method of procedure, so far as they could be reasonably known to him; but he did not assume the additional risk involved in the existence of defective blocking, of which he had no knowledge.

Many questions are elaborately discussed as to the correctness of instructions asked and refused, as well as the correctness of those given; but an examination of the points urged with reference to the giving and refusal of instructions satisfies us that the case was correctly presented to the jury, in view of the rules of law announced in this opinion. The judgment is therefore affirmed.

DECK v. BALTIMORE & O. R. CO. STEINER v. DECK.

(Court of Appeals of Maryland, Jan. 12, 1905.)

[59 Atl. Rep. 650.]

Evidence.

In an action against a railroad company for the shooting of plaintiff by defendant's servant, in the nighttime, on ejecting plaintiff and others from a freight train on which they were stealing a ride, the train being bound for Baltimore, it was not error not to permit a witness to state whether, if it had been daylight, he could have seen the city of Baltimore from the place where he was put off.

Harmless Error.

There is no prejudicial error in excluding evidence subsequently admitted without objection.

Shooting of Trespasser by Railroad Policeman—Evidence—Commission from State.

Where, in an action for the shooting of plaintiff by a servant of de-

Deck v. Baltimore & O. R. Co

defendant railroad on the ejection of plaintiff from a freight train on which he was stealing a ride, the servant testified that he was a police officer of defendant, and paid by it, it was proper to permit him to testify that he held a commission as policeman from the state, and to permit him to produce the commission and read it to the jury.

Same—Sufficiency of Evidence.

In an action for the shooting of plaintiff by a servant of defendant railroad on the ejection of plaintiff from a freight train on which he was stealing a ride, evidence considered, and *held* sufficient to show that the servant in question did the shooting.

Same—Evidence—Scope of Employment.

In an action for the shooting of plaintiff by a servant of defendant railroad on the ejection of plaintiff from a freight train on which he was stealing a ride, it appearing that the servant was a special police officer of the defendant, it was not incumbent on plaintiff to offer affirmative evidence to show that the servant was, at the time of the shooting, attending to the business of defendant.

Same—Liability—Scope of Employment.*

Defendant could not escape liability merely because there was no evidence of express antecedent authority to do the shooting, or of a subsequent ratification by defendant.

Same—Scope of Employment—Question for Jury.

In an action for the shooting of plaintiff by a police officer of defendant railroad on the ejection of plaintiff from a freight train on which he was stealing a ride, *held*, that under the evidence it was a question for the jury whether the servant acted as a commissioned officer of the state or within the scope of his employment by defendant.

Impeachment of Witness.

In an action against a railroad police officer for the shooting of plaintiff it was not error to refuse to permit defendant to impeach a witness for plaintiff by asking witness what there was in his record or standing that led defendant to arrest him at the time of the shooting.

Same.

A witness may be impeached by disproving his testimony or by general evidence affecting his general veracity.

Same—Harmless Error.

Where defendant was not permitted to ask plaintiff's witness a question by which he sought to impeach him, but defendant was subsequently examined, and did not deny the testimony, which he might have done, the ruling was not prejudicial to defendant.

Liability of Police Officer—Instruction.

In an action against a railroad police officer for the shooting of plaintiff, an instruction that if defendant recklessly and wantonly shot plaintiff the jury must find for him, unless the shooting was done in self-defense, was erroneous.

Same—Reckless—Definition.

Where, in an action for the shooting of plaintiff by defendant, a railroad police officer, on ejecting plaintiff from a train, recovery was sought for reckless conduct, a requested instruction that defendant must have shot plaintiff "intentionally" was erroneous.

Appeals from Court of Common Pleas; Henry Stockbridge, Judge.

Action by Louis Deck against the Baltimore & Ohio Railroad Company and Charles A. Steiner. From a judgment in favor of the railroad company, plaintiff appeals, and from a judgment against Steiner he appeals. Judgments reversed.

*See foot-note appended to *Letts v. Hoboken R., W. & S. Con. Co.* (N. J.), 11 R. R. R. 139, 34 Am. & Eng. R. Cas., N. S., 139.

Deck v. Baltimore & O. R. Co

Argued before McSHERRY, C. J., and FOWLER, BOYD, SCHMUCKER, and PEARCE, JJ.

Gustavus A. Korb and Myer Rosenbush, for Louis Deck.
Duncan K. Brent and W. Irvin Cross, for Baltimore & O. R. Co. and Chas. A. Steiner.

FOWLER, J. This is an action to recover damages for personal injury. Louis Deck sues the Baltimore & Ohio Railroad Company and Charles A. Steiner. The ground of the action is that Steiner, who is alleged to have been in the employ of that company, in the regular course of his business, shot the plaintiff, seriously and permanently injuring him. The defendants pleaded the general issue.

During the taking of the testimony of the plaintiff, which was offered to establish the responsibility of the railroad company for the assault and shooting of the plaintiff, the plaintiff reserved four exceptions, which relate to rulings on the evidence. At the close of the plaintiff's testimony on this question a prayer at the instance of the defendant was offered taking the case from the jury, from which ruling the plaintiff also excepted. Judgment was entered in favor of the railroad company, and the plaintiff has appealed. In the further progress of the case against the remaining defendant, Charles A. Steiner, he reserved two exceptions, one to the ruling on evidence and the other to the granting of the plaintiff's two prayers and the rejection of his first prayer. Judgment was entered against the defendant Steiner, and he also appealed. There are therefore two appeals in this record, and we will consider them in the order in which they were entered. But before doing so we will briefly state the facts of and the circumstances under which the shooting was done. It appears from his own testimony and that of other witnesses that on the 1st of July, 1899, the plaintiff and several companions, without authority, boarded a freight train of the defendant company, and rode thereon to Oella, a short distance beyond Ellicott City, where they spent the day. On the same evening they boarded another freight train of the same company, without authority, for the purpose of returning to Baltimore, and when it was approaching the city and was near Mt. Clare Station the plaintiff and his companions were ordered to leave it. The plaintiff testifies that he was already off the train, and about 15 feet from it, when he heard several shots fired, by one of which he was hit and seriously injured. First, then, we will consider the questions presented by the appeal of the plaintiff.

The plaintiff's first exception was taken to the refusal of the court to allow the witness to say whether, from the point where he was ordered off the train, if it was daylight, he could see the city of Baltimore, if looking towards the city. We are unable to see what relevancy the question or the answer thereto could possibly have had to the issues involved.

The shooting took place about 11 o'clock at night, and whether the city of Baltimore could or could not have been seen in daylight from the point indicated does not appear to be important or relevant. Nor do we find anything in the plaintiff's second exception, which was taken to the ruling out of the testimony of the witness Thomas tending to show that the defendant Steiner was a Baltimore & Ohio Railroad detective, for testimony as to the fact of Steiner's employment by that company as a detective was subsequently admitted without objection.

We find no error in the ruling complained of in the plaintiff's third and fourth exceptions. After testifying that he was a lieutenant of police, and was employed by the Baltimore & Ohio Railroad Company as a policeman at the time of the shooting, and that he was paid by that company, the defendant Steiner was asked on cross-examination whether he held a commission as policeman from the state. This question was allowed to be answered against the objection of the plaintiff. This constitutes the third exception. The witness answered that he had such a commission, and he was asked to produce it, which he did, and read it to the jury, whereupon the plaintiff filed a motion to strike out all the testimony of this witness in relation to witness being commissioned as police officer by the state of Maryland. This motion was overruled, and this action of the court is the ground of the plaintiff's fourth exception. We think it was very material that the jury should have been informed exactly how and in what capacity Steiner was acting. He had testified in chief that he was a police officer of the defendant, that he was employed and paid by it; but this was not all. He was also a state's officer, and as such commissioned as a special policeman of the Baltimore Ohio Railroad Company. It was but right, we think, that the defendant should be allowed to inform the jury that it had availed itself of the provisions of law which were passed for the purpose of giving corporations the benefit of capable men commissioned by the state to protect their property, and that it had not selected one of its own employees for that purpose.

This brings us to the consideration of the only important question involved in this appeal, and that is presented by the plaintiff's fifth exception, which is based on the ruling of the court granting the defendant's prayer taking the case or this branch of it from the jury. Was there any evidence in the case legally sufficient to prove that the defendant Steiner did the shooting complained of? In the first place, the plaintiff himself testifies that shortly after he was shot, and lying upon the ground, Thomas, a brakeman, came over with a lantern, and Steiner came also, and asked what was the matter; that plaintiff replied he was shot; and Thomas picked him up, and showed Steiner where the ball entered, and Steiner said, "Yes, if I hadn't shot the son of a bitch, I would have

kicked his ribs in." It is true that the witness Thomas contradicted this statement of the plaintiff, but it was for the jury to determine which one they would believe. Again, the witness Carlin testifies that Steiner told him he shot the plaintiff. We conclude, therefore, that the testimony on this point was legally sufficient to show by whom the shooting was done. Second. Is there any legally sufficient evidence in the case that Steiner was in the employ of the defendant company at the time of the shooting? This question must also be answered in the affirmative, for Steiner himself testifies that he was employed and paid by the defendant company as policeman at that time, and the commission he held from the state showed that he was appointed as "special policeman" of the railroad company. Other witnesses testified to the same effect—either that he was a detective of the company, as testified to by the plaintiff and the witness Morrison, or that he was such special officer or policeman at the time in question.

But the important question remains to be considered whether at the time of the shooting Steiner was attending to the business of the company, and, if so, whether he was acting within the scope of his duty. Assuming—for if what we have already said is correct we have a right to assume—that Steiner was present at the time of the shooting, and that he was in the employ of the company as its special officer, detective, or special policeman, and assuming also that the plaintiff and his companions had been on one of its trains as trespassers, and acting in a disorderly manner, it would not require much testimony to establish the fact that he was there not on any business of his own, but for the purpose of protecting the company's employees and its property. This was a laudable and proper purpose, but we do not think it is incumbent on the plaintiff, under the circumstances of this case, to offer affirmative and direct testimony to establish that fact. He was employed by the company, and he was there, and it will not be assumed he was there for any other purpose but to perform his duty; that is, as one of the witnesses said, "to look after all depredations on the company's property, such as robbing cars, breaking into trains, attempting to derail trains, and all violations of the law along the line of the road." If, then, he was present as an officer of the company, and as two witnesses testified he admitted he did the shooting, was he, under all the circumstances of this case, acting within the scope of his duty? Whether he was or was not so acting is ordinarily a question for the jury. It was contended on the part of the defendant company that, conceding the testimony we have already recited to be true, namely, that Steiner admitted the shooting, still the defendant cannot be connected therewith unless there is some evidence of an express antecedent authority to Steiner to do the act, or of a subsequent ratification thereof by the defendant.

But the authorities cited to sustain this proposition are cases of false arrest or malicious prosecution, and the principles announced therein have no application to this case. Thus, in the recent case of *Boyer v. Coxen*, 92 Md. 366, 48 Atl. 161, *Boyd, J.*, delivering the opinion of the court, said: "This court has heretofore followed the rule that the master is not exempted from liability for * * * damages merely because the act complained of was done by a servant, and in many cases exemplary damages have been allowed against the master for acts done by the servant without express authority from the former or ratification by him having been shown." See, also, *Evans v. Davidson*, 53 Md. 245-249, 36 Am. Rep. 400. Again, it is settled in this state, as we have said, that whether the act of the servant complained of is within the scope of his duty while acting in the furtherance of his master's business is generally to be determined by the jury as a matter of fact, and not by the court as a matter of law. *Consolidated R. Co. v. Pierce*, 89 Md. 503, 43 Atl. 940. It may be very difficult, as is illustrated in this case, for the plaintiff always to obtain full and complete proof of the terms of the servant's employment, and therefore it was held, as we said in the case just cited, citing *Cleveland v. Newsom*, 45 Mich. 62, 7 N. W 222, that the burden was on the defendant to show that the servant was not engaged in the course of his employment. But it is clearly shown by the testimony of the plaintiff that *Steiner* was employed by the defendant company as a police officer and detective, and it is further shown that, as such, it was his duty to protect the company's trains and property, and to look after all violations of the law along its road. And, even if this proof had not been adduced, it would have been proper for the jury to infer from the nature of *Steiner's* employment that he was authorized by the defendant not only to drive trespassers from the train, but to arrest them for the violations of the company's regulations. And it cannot be said that because the defendant did not authorize the shooting that therefore it cannot be held liable for the resulting injury to the plaintiff. In *Evans v. Davidson*, 53 Md. 245, 36 Am. Rep. 400, it appeared that the defendant had on his farm a negro (*Lewis*) who was employed to do general farm work; that on the day the plaintiff's cow was killed the defendant was away from home; that *Lewis*, in driving the cow from the plaintiff's cornfield, negligently struck her with a stone and killed her; that the defendant had given no orders in regard to driving the cattle out of the field, and that he did not know the cow was in the corn until after she was killed. The court below took the case from the jury, but *Alvey, J.*, in delivering the opinion of this court, said: "If the servant be acting at the time in the course of his master's service and for his master's benefit, within the scope of his employment, then his act, though wrongful or negligent, is to be treated as that of the master,

although no express command or privity of the master be shown. This general principle is sanctioned by all the authorities." And in determining whether there was legally sufficient evidence to go to the jury we said in the same case that, in the very nature of the employment, there must be some implied authority and duties belonging to it; and it was held, reversing the court below, that there was legally sufficient evidence to show the servant was acting in the course of his employment, and that the first and second prayers of the plaintiff, leaving it to the jury to find whether the servant had so acted, should have been granted. Quite a number of authorities are cited on the brief of the appellant to the effect that in the very nature of the employment of a detective and special officer there are some implied authority and duties belonging to it; but we do not consider it necessary to discuss them, for "we suppose all would say" that it would be a positive duty of one who was employed, as Steiner was, by the defendant, as a detective and special policeman, not only to eject trespassers from its trains, but to arrest them, and to use force in so doing.

This brings us to the question as to whether Steiner was acting as an employee of the company or as a commissioned officer of the state when the injury was inflicted. It appears to be clear from the testimony that he was employed and paid by the defendant at the time indicated, and that he was then acting as policeman and detective. As we have already said, it must be assumed that he had some implied authority and duties, even if none were expressly proved, and it certainly is not assuming very much to infer from the general nature of his employment that it was his duty to remove trespassers from the train. It must be remembered that, so far as the evidence shows there was not an actual attempt to arrest the plaintiff, but he was shot by the detective or policeman a few moments after he jumped from the train, and before he had gone more than 10 or 15 feet from it. This is a very different case from *Tolchester Beach Imp. Co. v. Steinmeier*, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846. In the first place, the case just cited was an action to recover damages for false imprisonment, and it was decided that the defendant company could not be held liable without proof of express precedent, authority, or subsequent ratification; but, as we have seen, this rule is not applicable to the case now before us. Again, the arrest which was the injurious act complained of in *Steinmeier's Case* was not made on the premises of the company, nor, said the court, "can it be said that it was done in the preservation of the company's property, for, assuming that in the collection of drift logs the superintendent was acting for the company (which its president denies), still it is not contended that the plaintiff was interfering to prevent their securing and collection." The testimony only shows that the arrest was ordered and made because of the plaintiff's assault. And, further, it is said that that which the

Deck v. Baltimore & O. R. Co

officer who made the arrest did, although paid by the defendant, was in the execution of the criminal law upon his own view of the affair, without warrant, and in discharge of what he supposed was his duty at common law, and that his act in no way inured to the benefit of the defendant company. It will be observed also that we said in the Steinmeier Case that for the purposes of that decision it was not necessary to hold that the officer who made the arrest was in no sense an officer of the company, and that, if called on to enforce its regulations, and he did so purely because of his relation to the company, it would be liable for acts done within the scope of his duty as such employee, although primarily he was a state officer. And whether he was acting in one capacity or the other is a question for the jury. *Dickerson et al. v. Waldron*, 135 Ind. 507-526, 34 N. E. 506, 35 N. E. 1, 24 L. R. A. 483, 488, 41 Am. St. Rep. 440; *Brill v. Eddy*, 115 Mo. 597-605, 22 S. W. 488; *Railway Co. v. Hackett*, 58 Ark. 387, 24 S. W. 881, 41 Am. St. Rep. 105. We are of opinion, therefore, that there is legally sufficient evidence to be found in the record to have justified the submission of the case to the jury, and, the court below having refused to do so, its judgment in favor of the defendant must be reversed.

Judgment reversed, with costs, and new trial awarded.

The remaining questions to be considered arise on the appeal of Charles A. Steiner against Louis Deck, which, as we have seen, presents two questions: First, as to the correctness of the ruling of the court in refusing to allow the appellant, defendant below, to ask witness Carlin what there was in his record or in his standing in the community that led Steiner to arrest him merely because he saw him on that occasion; and, secondly, whether there was error in granting the plaintiff's two prayers and the rejection of the defendant's first prayer.

First Exception. The record does not state what was the object in asking this question. On cross-examination, however, it would appear to have been the purpose of counsel to have the witness impeach his testimony already given; but the answer, if any had been given, must have been in the nature of a guess or an opinion, for it was impossible for the witness to state as a fact what there was in his record or standing which induced Steiner to arrest him merely because he saw him on that occasion. We find nothing in the record to support the assumption that the witness had been arrested merely because Steiner saw him. On the contrary, the witness had testified that he was walking through the company's yard; that he was on the company's property, although he said he thought it was county property. What he may have meant by this last statement does not appear. If, as we have said, it was the purpose of counsel to impeach the witness, this could have been done (1) by disproving the fact testified to by him. But this was not attempted, although there was ample opportunity to have done so. Or (2) by general evi-

dence affecting his veracity. But in impeaching the credit of a witness the examination must be confined to his general reputation, and not be permitted as to particular facts. 1 Greenleaf on Evidence, § 461. If it was intended to show that he had been indicted and convicted of some crime that would go to impeach his veracity, the proper evidence of such convictions should have been produced; but, in spite of the fact that Steiner was subsequently examined as a witness in behalf of the defendant, he did not deny the testimony given by the witness Carlin, and it may be, therefore, assumed that it was true, and, if so, the defendant was not injured by the refusal of the court to allow the question to be asked.

Second Exception. Was there any error in granting the plaintiff's prayers? The first of these prayers asked the court to instruct the jury "that if they find from the evidence that the plaintiff was walking on or near the tracks of the Baltimore & Ohio Railroad Company as testified to, and that the defendant came within a short distance of the plaintiff, and recklessly or wantonly fired a pistol towards the plaintiff, and thereby shot and wounded him, then their verdict must be for the plaintiff, unless they are satisfied from the evidence that said shooting was done for the purpose of preventing the plaintiff from killing said Steiner, or inflicting upon him great bodily harm; and that the facts at the time of the shooting were such as to warrant the reasonable belief in Steiner's mind, in the honest exercise of his judgment, that there was no other reasonably possible, or at least probable, means of preventing such injury to said Steiner, and that his act was one of necessity." By this instruction the jury are told that if they find the defendant recklessly and wantonly shot the plaintiff they must find for him, unless they find said shooting was done in self-defense. This proposition appears to be a contradiction in terms, for, if the shooting was found from the evidence to have been reckless and wanton, the jury could not properly, from the same evidence, have found it to have been done in self-defense. In other words, having found from all the evidence that the shooting was unjustifiable, they could not find from the same evidence that said shooting was justified by an honest belief of Steiner that he was in danger of great bodily harm. We find no objection to plaintiff's second prayer. It properly states the rule of the measure of damages in a case like this. Defendant's first prayer told the jury that the plaintiff cannot recover a verdict unless they find that the defendant intentionally shot the plaintiff. We cannot accede to this proposition, for the right of the plaintiff in this case to recover is founded not on the actual intention of the defendant, but on his reckless and wanton conduct as alleged in the narr. By reason of the error in granting the plaintiff's first prayer the judgment against the defendant Charles A. Steiner will be reversed, and the cause remanded for a new trial.

Judgment reversed, with costs, and a new trial awarded.

BRINKMEIER v. MISSOURI PAC. RY. CO.

(Supreme Court of Kansas, July 7, 1904.)

[77 Pac. Rep. 586.]

Injury to Employee—Defective Appliance—Notice to Railroad.

In an action against a railroad company for damages resulting from an injury caused by a structural defect in the coupling apparatus of one of its own cars, notice to the company of the defect will be inferred.

Injury to Brakeman—Defective Coupling—Assumption of Risk.*

A railroad brakeman whose duty requires him to couple cars does not assume the risk of injury from a defective coupling apparatus, unless he knows, or from all the circumstances should know, the danger arising from its use.

Same—Contributory Negligence.†

Contributory negligence in the use of a defective coupling apparatus cannot be imputed to a railroad brakeman merely because he knows it to be defective. In order to bar recovery, the danger of using the imperfect appliances must be so great and so apparent that a person of ordinary prudence would not encounter it.

Same—Same.

If a workman have the choice of several ways in which to do his work, he will be negligent if he reject those which are safe for one which is dangerous; but he may adopt any one which a reasonably prudent man would adopt, and not be negligent, although others may be absolutely safe.

Same—Same—Contributory Negligence.‡

Under all the circumstances of this case, the propriety of the conduct of a brakeman in using his foot to control a refractory drawbar while attempting to make a coupling should have been left to the jury to determine.

(Syllabus by the Court.)

*See monograph appended to *Hewitt v. East Jordan Lumber Co.* (Mich.), 13 R. R. R. 212, 36 Am. & Eng. R. Cas., N. S., 212.

†As to whether it is contributory negligence for a railroad employee to use an appliance with knowledge that it is defective, see *Murphy v. Baltimore, etc., R. Co.* (Ky.), 7 R. R. R. 295, 30 Am. & Eng. R. Cas., N. S., 295 (brakeman discovering defective condition of coupling only at moment of attempting to use it was not guilty of contributory negligence as matter of law); *Western Ry. of Alabama v. Arnett* (Ala.), 9 R. R. R. 132, 32 Am. & Eng. R. Cas., N. S., 132 (trackmen riding on hand car holding on to defective brace, when chargeable with notice of its condition, was not necessarily guilty of contributory negligence); *Taylor v. Nevada-California-Oregon Ry. Co.* (Nev.), 4 R. R. R. 781, 27 Am. & Eng. R. Cas., N. S., 781 (right to continue work relying on promise to repair); *McGhee v. Bell* (Ky.), 9 Am. & Eng. R. Cas., N. S., 345; *Parker v. South Carolina & G. Ry. Co.* (S. Car.), 6 Am. & Eng. R. Cas., N. S., 731; *Chicago & E. I. R. Co. v. Knapp* (Ill.), 14 Am. & Eng. R. Cas., N. S., 828 (not guilty of contributory negligence unless he knew that defect rendered appliance dangerous to use.)

‡See note appended to *Moore v. Kansas City, etc., Ry. Co.* (Mo.), 12 Am. & Eng. R. Cas., N. S., 580; *Kilpatrick v. Grand Trunk Ry. Co.* (Vt.), 4 R. R. R. 945, 27 Am. & Eng. R. Cas., N. S., 945; *Florida Cent. & P. R. Co. v. Mooney* (Fla.), 12 Am. & Eng. R. Cas., N. S., 722; *Carrier v. Union Pac. Ry. Co.* (Kan.), 17 Am. & Eng. R. Cas., N. S., 513; *Morris v. Duluth, etc., Ry. Co.* (C. C. A.), 22 Am. & Eng. R. Cas., N. S., 45; *Quirouet v. Alabama G. S. R. Co.* (Ga.), 18 Am. & Eng. R. Cas., N. S., 551; *Beal v. Atchison, T. & S. F. Co.* (Kan.), 18 Am. & Eng. R. Cas., N. S., 751.

Brinkmeier v. Missouri Pac. Ry. Co

Error from District Court, Sedgwick County; D. M. Dale, Judge.

Action by Henry Brinkmeier against the Missouri Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

C. V. Ferguson, for plaintiff in error.

J. H. Richards and C. E. Benton (David Smyth of counsel), for defendant in error.

BURCH, J. While serving the defendant in the capacity of brakeman, the plaintiff was injured in an attempt to couple freight cars. In an action for the recovery of damages a demurrer to his evidence was sustained, and the railroad company justifies the conduct of the trial court upon three grounds, viz.: That it had no notice of the defect in the appliance causing the injury; that the hazard was one incident to plaintiff's employment, and therefore assumed; and that the plaintiff was guilty of contributory negligence.

The defective appliance was a part of the equipment of one of the defendant's own cars, and the defect itself was alleged to be one originating in faulty construction. If this be true, proof of notice was unnecessary. It was the duty of the defendant to furnish a properly constructed coupling apparatus. Whether the defendant built the car itself, or employed others to do so, or purchased it of reliable car dealers, it was bound to know the condition of the coupling contrivance when the car was put into service, and it will not now be heard to say that it had no knowledge of structural defects. In 20 A. & E. Encycl. of L. (2d Ed.) 93, occurs the following accurate summation of the authorities: "Where the defect through which the injury occurs is in the original construction of the appliance or instrumentality, notice thereof to the master is unnecessary. In case of structural defects, knowledge thereof by the master will be inferred. This doctrine is no more than an application of the general rule that it is the master's duty to exercise ordinary care in providing tools, machinery, and appliances that are reasonably safe." The language of Chief Justice Breese regarding the duty of a municipality to know the character of a structure it supplies for the use of its inhabitants is pertinent to the attitude of a private corporation toward its employees. He said: "For the proper construction of this sidewalk, it is not denied the town authorities were responsible. They should see to it that such structures are properly made and reasonably safe, and they must be kept so. They, being the projectors of them and the builders of them, are in law held to a knowledge of their original condition. It would be absurd to say they must have notice of the original defect, when they themselves are the authors of the defect. Why notice to a party of original defects in a work he is bound to make safe and reasonably

Brinkmeier v. Missouri Pac. Ry. Co

free from defects? The town being in fault at the outset, no notice was necessary." *Alexander v. Town of Mt. Sterling*, 71 Ill. 366. If the case of *Finnerty v. Burnham*, 205 Pa. 305, 54 Atl. 996, decided in 1903, an injury occurred from the use of a defective chain of the equipment of a crane. The master supplying the crane attempted to justify on the ground that the chain had been purchased of one of the most reputable manufacturers, and placed in stock; that others of a similar kind had been furnished, so that the employee could select any one he desired; and that general instructions had been given to report and had repaired any defects. But the court adopted in full the statement of the law already quoted from the *American & English Encyclopedia of Law*, and further said: "Where a chain is used as an attachment to a crane for the purpose of lifting very heavy weights, the same rule that imposes upon the employer the duty of supplying a reasonably safe and suitable crane requires him to furnish a chain of like character." The defendant cites certain decisions of this court supposed to favor a different doctrine, but their real purport is misapprehended. Only the general formulas of the law relating to notice of defects are referred to in those cases, and the particular rule under consideration was not discriminative.

The plaintiff was injured while attempting to adjust a drawbar with his foot, in order to effect a coupling. His evidence tended to prove that when properly constructed the drawbar is in the center of the car, and is held in place by heavy timbers on each side of it called "draft timbers." Above the neck of the drawbar is a peice of timber, and below it a strap or plate of iron, both held fast by bolts running through the ends of the draft timbers. The draft timbers should be near enough together to prevent the drawbar from becoming out of line, and, in order to secure a snug fit, a large bolt is passed down from the timber above on each side of the drawbar, between it and the draft timber, and through the plate beneath. The car in question had been constructed without the bolts necessary to prevent the lateral play of the drawbar, and the draft timbers were so far apart that when pushed to one side the head of the drawbar failed to meet squarely the head of the drawbar on the car to be coupled, but passed by it and crushed the plaintiff's foot. A spectator of the accident described the draft timbers as worn and slivered up, but the evidence of that witness, as well as that of the plaintiff, clearly showed the primary defect to be one of construction, and the case should have been submitted to the jury so far as the question of notice to the defendant was concerned.

The contention of the defendant that the plaintiff assumed the risk of injury is based upon his testimony that it was not unusual for drawbars to be out of line, and that it was necessary almost every day for him to put them in place in order

to make couplings. But the plaintiff further testified that, so far as he knew, the only result attending the meeting of cars with a drawbar out of line was that they would fail to couple. The drawbar in question was not movable to such an extent that it was obvious it would slip by. There is no evidence that any circumstance of that character had ever been brought to the plaintiff's attention. He was a brakeman, and not a skilled mechanic or scientific car builder. He was not chargeable with greater knowledge of the effect of the relation of pieces and the operation of forces than his daily experience furnished. If the knuckles of the drawbars would still meet and the cars simply recoil, as the plaintiff believed would be the case if the drawbar were not in position, there was no danger, and, without evidence indicating that the erratic action of the drawbar in this case might or should have been anticipated, or that the defendant knew or should have known the danger attending its unforeseen conduct, it cannot be said as a matter of law that he contracted to take the risk of such a result. *Railway Co. v. Bancord*, 66 Kan. 81, 71 Pac. 253.

On the general question of contributory negligence, the case of *C., R. I. & P. Ry. Co. v. Eversole* (Kan.) 69 Pac. 1126, is controlling. The casualty under consideration is a duplication in all essential respects of the one there described. The defendant attempts to make a distinction between them by claiming that the couplers did not pass by in this as they did in the *Eversole* Case. The record, however, is otherwise. On direct examination the plaintiff testified: "Q. Where was your foot, between the lip of the moving car and the knuckle of the other car? A. Yes, sir. Q. Where did the drawbar and the knuckle that was closed on it of the moving car finally stop against the drawbar on the car standing still? A. Right in this position in here. Q. Did it slip by? A. Yes, sir; it threw this drawbar away over. Q. Which way—from you, or towards you? A. From me. It went away over from me." It is true that, before the accident occurred, the plaintiff attempted to adjust the drawbar by hand, and found it would not stay in position. But mere knowledge of a defect does not bar recovery. To establish negligence per se, the danger of using the imperfect appliance must be so great and so apparent that a person of ordinary prudence would not encounter it. Only after the plaintiff's foot had been caught and held did he discover the possibility of the drawbar being thrown so far to one side by the impact of the car that it would pass by the knuckle of the drawbar on the other car instead of meeting it face to face.

The propriety of the plaintiff's use of his foot to push the drawbar into place was a question of fact for the triers of fact, and not a question of law for the court. The defective car was moving so slowly that the plaintiff had ample time to adjust himself to meet its approach in safety. The engine was

Brinkmeier v. Missouri Pac. Ry. Co

disconnected, and he had nothing to fear from any sudden or unexpected impulse which might be given to the car. With respect to the method of assisting couplings, the plaintiff testified: "Q. How did you assist? A. Assisted in adjusting the drawbars to the center of the car so that they may make. Q. Well, how did you do that? How did you proceed about it? A. Used my hand or my foot, whichever came handiest to do that work, to shove them over." There was no rule of the company governing the conduct of its brakemen with respect to coupling cars whose drawbars might be out of line. The plaintiff did not know, and was not bound to anticipate, that the drawheads would pass each other, and it is only on the assumption that no man of ordinary prudence would have used his foot to control the refractory bar that plaintiff could be declared to be negligent as a matter of law. This assumption the district court was not warranted in making.

There was evidence that drawbars were sometimes wedged into place by pieces of wood, or stones or cinders, if any were at hand. The law is plain that a plaintiff may not recover for injuries resulting from his voluntary choice of an unsafe method of doing his work when a safe one is open to him. *Carrier v. Railway Co.*, 61 Kan. 447, 59 Pac. 1075. But to be unsafe a method must be such that a reasonably prudent man would not, under all the circumstances, adopt it. The question must always finally be resolved with reference to that standard. If several ways be open, and one of them be such that a reasonably prudent man would choose it, no negligence can be imputed to the choice, even if all the others be absolutely safe. In this case the plaintiff might have allowed the cars to meet and rebound, and, after they had come to rest, might have blocked the drawbar and waited for the engine to return to make the coupling. Then he would not have been injured. Or he might have refused to couple the car until it had been repaired, or he might have left the service of the company. Then he would not have been injured. But if a reasonably prudent man would have attempted to make the coupling, and if, in doing so, such a man would have used his foot in a particular way, the plaintiff could follow the same course and not be negligent; and, unless he be guilty of negligence, he may recover—the elements of a cause of action in his favor being proved.

The district court having undertaken to determine as matters of law questions of fact which should have been submitted to the jury, its judgment is reversed, and the cause is remanded with direction to grant the plaintiff a new trial. All the Justices concurring.

ATCHISON, T. & S. F. RY. CO. *v.* DAVIS.

(Supreme Court of Kansas, Jan. 7, 1905.)

[79 Pac. Rep. 130.]

Injury to Employee—Petition—Necessity of Designating Negligent Agent.*

Where a petition in a personal injury case alleges a specific act of negligence by one of three designated agents of the defendant, it is not subject to a motion to make the allegation more definite and certain by pointing out which of such agents is claimed to have committed the act, when it is also averred that plaintiff has no further information, and such averment is not shown to have been made in bad faith.

Verdict—Amendment.

Where a jury, after reporting its verdict and special findings, is sent back to make one of the latter more definite, a motion for a new trial, filed while the jury is still out for that purpose, will not be treated as prematurely filed, where there is some evidence that the attorney who presented the motion to the clerk requested that it be held until the return of the jury, and the clerk's indorsements upon the motion and the special findings show a simultaneous filing; the trial court having heard and decided the motion upon its merits.

Motion for New Trial—Waiver of Objections.

A recital in a case-made that upon the hearing of a motion for a new trial, which included several grounds, the attorney for the defeated party argued only a part of such grounds, does not of itself show a waiver of the grounds not argued.

Case at Bar.

The evidence examined, and held sufficient to support the verdict and special findings.

(Syllabus by the Court.)

Error from District Court, Franklin County; C. A. Smart, Judge.

Action by Isaac Davis against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

A. A. Hurd and O. J. Wood, for plaintiff in error.

Pleasant & Pleasant and L. T. Wilson, for defendant in error.

MASON, J. Upon a personal injury claim, Isaac Davis recovered a judgment for \$2,000 against the Atchison, Topeka & Santa Fe Railway Company, and the defendant prosecuted error. A former judgment for plaintiff in the same case was reversed upon the ground that one of the special findings made by the jury was against the evidence. See *Railway Co. v. Davis*, 64 Kan. 127, 67 Pac. 441, where the essential facts out of which the litigation grew are stated.

The first assignment of error relates to a question of pleading. The petition alleged that, while plaintiff was helping to load a rail upon a flat car, the train of which it was a part was negligently started without notice to him, causing a

*See foot-note appended to *Bolin v. Southern Ry. Co.* (S. Car.), 7 R. R. 320, 30 Am. & Eng. R. Cas., N. S., 320.

Atchison, etc., Ry. Co. v. Davis

severe wrenching of his wrist; that such premature starting of the train was due to a signal given by an employee of the defendant; that plaintiff could not learn what particular employee gave the signal, but that it was either the road master, the conductor, or the brakeman; and that the facts in this respect lay peculiarly within the knowledge of the defendant. Defendant filed a motion to require plaintiff to make his petition more definite and certain, by setting out specifically which of the employees designated was claimed to have been responsible for the starting of the train, and also a motion to strike out the allegations that plaintiff could not learn the facts in this regard, and that they lay peculiarly within the knowledge of defendant. Both motions were overruled. In this there was no error. The plaintiff pointed out the specific act of negligence complained of, and, if it was true that he could not learn by what agent of the company it was committed, this was the utmost he could do, whether or not the defendant had any better means of information. If it could be gathered from the record that the allegation of want of further knowledge was made in bad faith, and that the defense was hampered by an intentional concealment, a very different question would be presented, but in fact the evidence supported the averment.

All the other assignments relate to errors involved in the overruling of a motion for a new trial, and two objections are made to their consideration. The first is based upon a claim that the motion for a new trial was prematurely filed, and for that reason could not have been sustained. The facts as disclosed by the record appear to be as follows: When the verdict and special findings were first returned, one of the latter was found to require a more definite answer, and the jury was sent out to correct the defect. While the jury was still out for this purpose, the defendant's attorney handed to the clerk the motion for a new trial. An affidavit of the attorney states that, as he did so, he requested that the motion be filed when the jury again reported. An affidavit of the clerk states that the attorney told him to file the motion, and said nothing about holding it. The motion was in fact filed before the final return of the jury. The clerk's indorsements upon the motion and upon the special findings purport to show the hour of filing, being the same in each case—11 o'clock a. m. The trial court considered the motion upon its merits, and overruled it. Granting that a motion for a new trial filed while the jury is still out is not entitled to consideration, no occasion for the application of the principle is here shown. The return of the findings and the filing of the motion were practically simultaneous, and, especially in view of the fact that the court heard and decided the motion upon its merits, instead of striking it from the files or refusing to consider it, it will be treated as having been filed at a proper time. The second objection is based upon the

fact that the record discloses that upon the hearing of the motion for a new trial the defendant's attorney argued certain enumerated reasons for setting aside the verdict, and no others. It is contended that this shows an effective waiver of all the grounds not included in the list of those argued. It is true that the trial court is entitled to know upon what grounds the defeated party claims a right to a new trial. And any conduct on the part of the attorney presenting the motion that might justly lead the court to understand that he relied only upon certain of the matters alleged in the motion, and not upon others, would doubtless be treated as a waiver of the latter. For illustration, if the court were to inquire of the attorney upon what grounds he relied, and in response he should name only a part of those set out in the motion, this might be deemed a waiver of any to which he made no reference. But no such effect can be given to the mere omission to argue all the grounds stated, without any showing of other circumstances affecting the matter.

It is contended by plaintiff in error that there was no support in the evidence for the general verdict, or for certain of the special findings. It appears that no one but the plaintiff was aware of his being injured at the time of the occurrence complained of, that his work was not interrupted, and that he continued his duties as foreman of the section hands for more than seven months afterwards, and until he was discharged by the company. But these considerations do not affect the question whether there was any evidence in support of his claim. It was found by the jury, in answer to an interrogatory submitted to them, that the signal to start the train was given by the conductor or roadmaster, and it is especially urged that there was an entire lack of testimony to justify this finding. It is true that no witness professed to have seen the signal given at this particular time, but the engineer stated that he had in no instance started the train without receiving a signal to do so. This was some evidence that a signal was given. There was also testimony that the signals to start were generally given by the roadmaster, but sometimes by the conductor. As intimated in the opinion accompanying the reversal of the former judgment, the jury were authorized to draw the inference that one of the other of these employees gave the signal upon the occasion in question. In response to an interrogatory whether plaintiff could have released his hold on the rail when he discovered that the train had started, the jury answered, "Not with safety to himself and men." It is argued that this reply was evasive, and that the question could and should have been answered by a direct "Yes" or "No." Granting that this is true, the next finding was that plaintiff was prevented from letting go of the rail by the danger to himself and others, and the practical effect of the two answers was the same as though the jury had said that plaintiff, as a physical fact,

Whitlow v. Nashville, etc., R. Co

could have released the rail, but to have done so would have endangered his own safety and that of others. The practice of giving argumentative and indirect answers is not to be commended, but it cannot be said in this instance that the fault was so flagrant as to require a reversal of the judgment. A final complaint is directed against a finding that plaintiff would have been injured just the same, even if he had released his hold upon the rail when he discovered that the train was in motion. The former judgment was reversed by reason of the same answer having been given to the same question. But while such answer was in direct conflict with the plaintiff's own testimony as it stood when that ruling was made, at the later trial he modified his earlier statements so that such inconsistency no longer exists.

The judgment is affirmed. All the Justices concurring.

WHITLOW v. NASHVILLE, C. & ST. L. R. CO.

(Supreme Court of Tennessee, Dec. 24, 1904.)

[84 S. W. Rep. 618.]

Action under Foreign Statute—Jurisdiction.

The courts of one state have power in a proper case to enforce rights of action under a statute of another state.

Same—Same—Penal Statute.

The penal statute of a state cannot be enforced by the courts of another state.

Same—Penal Statute—Construction.

In determining whether a statute is penal, so as to deny jurisdiction to the courts of another state, in which an action thereon is brought, such courts are not bound by the construction placed on the statute by the courts of the state which enacted it, but this is to be determined by the court in which the action is brought.

Same—Employers' Liability Act—Jurisdiction—Penal Statute.*

Code Ala. 1896, § 27 (Code 1886, § 2589) providing an action for injuries to an employee resulting in death to be maintained by a personal representative of decedent, is not a penal statute, so as to prevent the courts of another state from entertaining an action based thereon.

Same—Same—Repugnancy to Policy of State.

The right of action for injuries to an employee resulting in death given the personal representative of decedent by Code Ala. 1896, § 27 (Code 1886, § 2589), is not so repugnant to the policy of the laws of Tennessee as to prevent an action based thereon in the courts of that state.

Same—Same—Same—Dissimilarity.

Courts of Tennessee will not decline in a proper case to entertain an action for injuries to an employee resulting in death based on Code Ala. 1896, § 27 (Code 1886, § 2589), because of dissimilarity between its provisions as to damages and those of Tennessee on the same subject.

Appeal from Circuit Court, Marion County; S. D. McReynolds, Judge.

*See foot-note appended to *Bain v. Northern Pac. Ry. Co.* (Wis.), 12 R. R. R. 31, 35 Am. & Eng. R. Cas., N. S., 31; *St. Louis, I. M. & S. Ry. Co. v. Robertson* (Ark.), 7 R. R. R. 78, 30 Am. & Eng. R. Cas., N. S., 78.

Whitlow v. Nashville, etc., R. Co

Action for wrongful death by J. Y. Whitlow, administrator, against the Nashville, Chattanooga & St. Louis Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

Stewart & Stewart and Chas. C. Moore, for appellant.
Spears & Spears and Claude Waller, for appellee.

NEIL, J. This action was brought in the circuit court of Marion county to recover damages for the wrongful death of one John Whitlow, who it is alleged was killed on the line of the defendants' railway in the town of Bridgeport, in the state of Alabama. The action is based upon section 27 of the Code of 1896 of that state. It also appears as section 2589 of the Code of 1886. The original act on which these sections were based was passed on the 5th of February, 1872. The statutory provision above referred to reads as follows:

"A personal representative may maintain an action, and recover such damages as the jury may assess, for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission or negligence, if it had not caused death; such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for such wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate."

Two points were made by the defendant in the court below on this statute, and both were sustained, and as a result of sustaining these objections the plaintiff's action was dismissed. We need not state with particularity the method by which the points were raised. It need only be said that they were sufficiently presented.

From the action of the court below the plaintiff appealed, and the matter is now before us for consideration.

The first point made is, in substance, that the statute of Alabama above referred to is a penal statute, and, being so, cannot be enforced in the courts of this state. The second is that the statute of Alabama under which this suit is instituted and the statute of Tennessee giving a right of action in case of wrongful death are so dissimilar in their purposes and enforcement that the courts of Tennessee will not undertake to enforce the Alabama statute.

1. The courts of this state have the power to enforce, and constantly do enforce, rights of action granted under foreign

Whitlow v. Nashville, etc., R. Co

statutes. *R. R. v. Sprayberry*, 8 Baxt. 341, 35 Am. Rep. 705; *Id.*, 9 Heisk. 852; *Hobbs v. R. R.*, 9 Heisk. 873; *R. R. v. Foster*, 10 Lea, 351; *R. R. Co. v. Lewis*, 89 Tenn. 235, 14 S. W. 603; *R. R. v. Reagan*, 96 Tenn. 128, 136, 137, 33 S. W. 1050. But in such cases, where the right of action is one unknown to the common law, the foreign statute must be pleaded, and the remedy prescribed by it must be pursued. 9 Heisk. 852, 854, 96 Tenn. 128, 136, 137, 33 S. W. 1050; 89 Tenn. 235, 14 S. W. 603; 10 Lea, 351, 359, 365.

2. But no state will enforce the penal laws of another state. Penal laws, however, strictly and properly, are those imposing punishment for an offense committed against the state. The test whether a law is penal is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. In that case it is said, quoting with approval from *Wisconsin v. Pelican Insurance Company*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239:

"The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties." Again: "For the purpose of extraterritorial jurisdiction it may well be that actions by a common informer, called, as Blackstone says, 'popular actions, because they are given to the people in general,' to recover a penalty imposed by statute for an offense against the law, and which may be barred by a pardon granted before action brought, may stand upon the same ground as suits brought for such a penalty in the name of the state or of its officers, because they are equally brought to enforce the criminal law of the state." Again, it is said: "The question whether a statute of one state, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."

3. In determining the question, whether a statute of a foreign state is penal in the international sense, so as to deny jurisdiction to the tribunals of a foreign state in which an action thereon is brought, such tribunals are not absolutely bound by the construction placed upon such statutes by the courts of the state which enacted it. "The test," said the court, in *Huntington v. Attrill*, *supra*, "is not by what name the statute is called by the Legislature or the courts of the state in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against

Whitlow v. Nashville, etc., R. Co

the public, or a grant of a civil right to a private person. In this country the question of international law must be determined in the first instance by the court, state or national, in which the suit is brought."

4. The right of action given by the Alabama statute sued on in this case is not a penal one in the international sense of the term.

It is true that in construing this statute, or a prior one of similar purport, the Supreme Court of Alabama has held that it is not necessary to aver that the intestate left a widow, children, or next of kin (*Railway Co. v. Waller*, 48 Ala. 459); and that evidence of loss of services, or mere pecuniary loss is immaterial and irrelevant (*Railroad Co. v. Freeman*, 97 Ala. 289, 11 South. 800; *Railroad Co. v. Shearer*, 58 Ala. 672; *Buckalew v. Ry. Co.*, 112 Ala. 146, 20 South. 606; *Railroad v. Burgess*, 116 Ala. 509, 22 South. 913); and that evidence as to age, physical and mental condition, and earning capacity, and occupation of plaintiff's testator or intestate, and the amount of money contributed by him from his earnings to the support and maintenance of those dependent upon him, is immaterial and incompetent (*Railroad Co. v. Tegner*, 125 Ala. 593, 28 South. 510). It is also true that the court in several opinions (*Railroad Co. v. Shearer*, supra; *Railroad Co. v. Sullivan*, 59 Ala. 279; *Railroad Co. v. Freeman*, supra), has referred to the damages to be assessed under the statute as "a pecuniary mulct," "a punishment or fine," against the wrongdoer, to be distributed by the administrator is personal property. Yet no one can read the foregoing authorities, and other decisions of the Supreme Court of Alabama on cases arising under this statute (*Tanner's Ex'r v. Railroad Co.*, 60 Ala. 621; *Railroad v. Copeland*, 61 Ala. 376; *Cook v. Railroad Co.*, 67 Ala. 533; *Railroad Co. v. Womack*, 84 Ala. 149, 4 South. 618; *Bentley v. Railroad Co.*, 86 Ala. 484, 6 South. 37; *Railroad Co. v. Black*, 89 Ala. 313, 8 South. 246; *Leak v. Railroad Co.*, 90 Ala. 161, 8 South. 245; *Railroad Co. v. Vaughan*, 93 Ala. 209, 9 South. 468, 30 Am. St. Rep. 50; *Railroad Co. v. Meadors*, 95 Ala. 137, 10 South. 141; *Railroad Co. v. Dobbs*, 101 Ala. 219, 12 South. 770; *Railroad Co. v. Martin*, 117 Ala. 367, 23 South. 231; *Railroad Co. v. Bush*, 122 Ala. 470, 26 South. 168; *Armstrong v. Street Railway Co.*, 123 Ala. 233, 26 South. 349; *Shannon v. Jefferson County*, 125 Ala. 384, 27 South. 977; *Railroad Co. v. Foshee*, 125 Ala. 199, 27 South. 1006; *Railroad Co. v. Bryan*, 125 Ala. 297, 28 South. 445; *Railroad Co. v. Mitchell*, 134 Ala. 261, 32 South. 735; *Railroad Co. v. Hamilton*, 135 Ala. 343, 33 South. 157; *Railroad Co. v. Shelton*, 136 Ala. 191, 34 South. 194; *Railroad Co. v. Guest*, 136 Ala. 348, 34 South. 968; *Railroad Co. v. Crenshaw*, 136 Ala. 573, 34 South. 913; *Bryant v. Railroad Co.*, 137 Ala. 488, 34 South. 562) as a series, and note the questions that were stated and discussed in them, without being convinced that these cases

were ordinary damage suits, brought to recover for a wrongful death inflicted by the defendant upon the intestate or testator of the plaintiff, and for the benefit of the estate of the person so killed; that the only difference, in respect of damages, between these suits and others brought to recover for a wrongful death inflicted—as for example, for the death of an employee (for cases of this character, see *Railroad Co. v. Bridges*, 86 Ala. 449, 5 South. 864, 11 Am. St. Rep. 58; *Williams v. Railroad Co.*, 91 Ala. 635, 9 South. 77; *Railroad Co. v. Orr*, 91 Ala. 548, 8 South. 360; *Railroad Co. v. Mallette*, 92 Ala. 209, 9 South. 363; *James v. Railroad Co.*, 92 Ala. 231, 9 South. 335)—resides in the fact that, while in the class of cases last referred to the jury are furnished by the court with rules of approximate certainty for measuring the damages, in cases arising under the statute sued on in the present case they are left somewhat at large, with no more certain guide than that they must consider all of the circumstances of the occurrence eventuating in the death complained of, for the purpose of ascertaining and determining the degree or extent of the negligence, if any, of the defendant, and upon such consideration they must assess damages to such amount or in such sum as to them may seem a just retribution for the injury in such manner inflicted, ranging from nominal damages upwards, according to or proportioned to the degree of culpability; and, further, that the terms “mulct,” and “punishment,” and “fine,” used in some of the decisions referred to, do not, in these decisions, bear the meaning attached to them in the domain of criminal law, and were not intended to be so understood by the Supreme Court of Alabama.

Forcible confirmation of this conclusion is found in the language used by that court in *Railroad Co. v. Bush*, supra, 122 Ala. 488, 489, 26 South. 173, 174.

In that case it appeared that the plaintiff below propounded to the defendant interrogatories for a discovery, under the provisions of Code 1896 (Ala.) §§ 1850–1858, answers to which were made by the engineer. When these answers were offered in evidence by the plaintiff, defendant objected to their introduction on the ground that defendant could not, in a proceeding of this character, be legally and constitutionally compelled to answer the interrogatories. The ground of objection offered by the defendant was that the action was penal in its nature, and that in such actions the defendant is protected both by the rules applicable to discoveries and by constitutional guaranty against any compulsory process to compel him to answer any questions the answers to which would have a tendency to incriminate him, or to expose him to a penalty or a forfeiture. After noting that the Supreme Court of the United States (*Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110; *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L.

Ed. 746) had held that proceedings for penalties and forfeitures were within the provisions of the fifth amendment to the federal Constitution that no person shall be compelled in a criminal case to be a witness against himself, and that this provision was a protection against compulsory self-disclosure in any proceeding, civil or criminal, of matters tending to incriminate the witness, or to expose him to a penalty or forfeiture, the court proceeded:

"If the damages recoverable in an action of this character were, strictly speaking, a penalty imposed by law, we would be inclined to give to our constitutional provision on the subject the same construction that has been placed on the similar provision of the federal Constitution, and to hold that the defendant could not be compelled, even by statute, to give or furnish evidence in aid of a recovery against it. But while the damages recoverable are undoubtedly, under our former rulings, punitive in their nature, and not compensatory, they are not, in a strict sense, a penalty; nor is the action penal, or quasi criminal, within the meaning of the constitutional provisions as above construed. The statute is remedial, and not penal, and was designed as well to give a right of action where none existed before as to 'prevent homicides,' and the action given is purely civil in its nature for the redress of private, and not public, wrongs." The objection was accordingly overruled.

What is here said in the quotation just made is the logical result of all the preceding Alabama cases on the subject, when one goes to the very substance of them, disregarding mere formal expressions; and it is impossible, in the face of this decision, to hold that actions under the statute are penal in the international sense.

5. The action is not so repugnant to the public policy of our state as that we should, for that reason, decline to entertain it. The bringing and disposition of suits for damages caused by wrongful death is a matter of everyday occurrence in the courts of this state. And as said by Mr. Justice Brewer in *Stewart v. Baltimore & Ohio Railroad Company*, 168 U. S. 445, 448, 449, 18 Sup. Ct. 105, 106, 42 L. Ed. 537: "A negligent act causing death is in itself a tort, and, were it not for the rule founded on the maxim, '*Actio personalis moritur cum persona*,' damages therefor could have been recovered in an action at common law. The case differs in this important feature from those in which a penalty is imposed for an act in itself not wrongful, in which a purely statutory delict is created. The purpose of the several statutes passed in the states in more or less conformity to what is known as '*Lord Campbell's Act*' is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial, for the benefit of the persons injured by the death. An action to recover damages for a tort is not local, but transitory, and

Whitlow v. Nashville, etc., R. Co

can, as a general rule, be maintained wherever the wrongdoer can be found. *Dennick v. Central Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439. It may be well that, where a purely statutory right is created, the special remedy provided by the statute for the enforcement of that right must be pursued; but where the statute simply takes away a common-law obstacle to a recovery for an admitted tort it would seem not unreasonable to hold that an action for that tort can be maintained in any state in which that common-law obstacle has been removed. At least it has been held by this court in repeated cases that an action for such a tort can be maintained where the statute of the state in which the cause of action arose is not, in substance, inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced"—citing *Texas & Pac. Ry. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Dennick v. Central Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439; *Huntington v. Attrill*, *supra*; *Northern Pac. Ry. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958.

In the case last cited, the court, speaking through Mr. Justice White, quoted with approval the following language from *Herrick v. Minneapolis, etc.*, St. L. R. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771, which we also adopt, viz.: "But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens."

6. Nor will the court decline to entertain the action because of dissimilarity between the provisions of the Alabama statute and those of our own upon the same subject.

As we understand the Alabama law, the statute sued on in this case covers all rights of action for damages on account of wrongful death except those wherein the representatives of an employee sue the employer who has caused his death; recovery for this latter class of damages falling under another statute. Of course, under a statute so broad many questions must arise, based upon the reciprocal relations, rights, and duties of the respective parties, which must be considered and disposed of in determining, in the first instance, the existence of a cause of action, and, secondly, the degree of negligence or culpability. The same, and even greater, diversity

is discovered in the operation of our own statute, since it prescribes a remedy for all cases of wrongful death, without distinction in respect of the relations of the parties. And even a greater diversity is experienced by all courts in administering contracts, both domestic and foreign. But it is not on these grounds that the able counsel of the defendant place their objection. The dissimilarity complained of, other than that already considered and disposed of, is in respect of the measure of damages. It is said that while, under our statute, the mental and physical suffering of the deceased, his loss of time, and expense on account of the injury, also evidence of age, physical condition, earning capacity, and expectation of life, may all be considered. Under the Alabama statute none of these are admissible, but the amount of damages is to be assessed upon a general and particular view of all of the circumstances attending the injury, and proportioned to the culpability disclosed upon a comparison of such facts and circumstances with the measure of duty imposed by law upon the defendant in the situation shown by the evidence, and the ascertainment of the breach of such duty, and the extent of it—in short, upon the degree of negligence proven in the cause—and that such sum is to be assessed for this negligence as the jury may deem adequate punishment therefor.

We do not think that Tennessee courts and juries will find any more difficulty in administering this rule than is experienced by the tribunals of our sister state. It is quite as difficult (and more uncertain in results) to ascertain how much should be allowed in a given case for mental and physical suffering as to fix a sum that shall approximately measure in money the degree of culpability shown by a defendant guilty of negligence. Moreover, the tribunals of this state have long applied the substance of the Alabama rule in the reverse aspect in measuring the degree of culpability of a plaintiff whose contributory negligence, in a certain well known class of cases in this state, does not bar the action, but only mitigates the damages. In this class of cases the juries are, in substance, instructed to consider and estimate the degree and extent of the plaintiff's negligence, and to abate his recovery by such amount as they may deem just in view thereof.

7. We should add that we do not understand that under the Alabama statute the jury are left to unrestrained action in fixing the amount of the recovery, but that they are subject to the overruling discretion of the court, in case it should be of opinion that the amount found is so large as to evince passion, prejudice, or caprice; since it is laid down as a general principle (in *Furniture Co. v. Little*, 108 Ala. 399, 19 South. 443, and see *Railroad Co. v. Burgess*, 119 Ala. 555, 564, 565, 25 South. 251, 72 Am. St. Rep. 943; *Railroad Co. v. Mallette*, 92 Ala. 209, 217, 218, 9 South. 363, 365, 366) that punitive damages are in the discretion of the jury, but

Woods v. Northern Pac. Ry. Co

only within "reasonable limits." At all events, the constitution of our own courts is such, and the relation between the court and the jury are of such a character, under our laws, that the trial judge has always, and this court on appeal always, the power to set aside verdicts on the ground above stated; and every cause of action to which the hospitality of our tribunals is extended must be understood as so qualified, in as much as we cannot alter the constitution of our courts for their entertainment.

It results that there is error in the action of the court below in dismissing the plaintiff's suit, and the cause is remanded for proper issue and further proceedings.

WOODS v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington, Jan. 31, 1905.)

[79 Pac. Rep. 309.]

Master and Servant—Assumption of Risk—Obvious Dangers.*

A railroad, in fulfilling the duty enjoined upon it by the Constitution and statute (Const. art. 12, § 13, and 1 Ballinger's Ann. Codes & St. §§ 4318, 4319) of receiving and transferring cars from other lines of railroad, is bound to inspect such cars to see that no hidden danger, such as want of repairs, menaces its employees, but is not bound to inform an employee of a difference in construction between the foreign car and its own cars, such as a difference in the location of the hand-grab of a freight car, which is perfectly obvious to the employee, and the risk of which he therefore assumes, without being expressly informed thereof.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by William Woods against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Jas. F. McElroy and B. S. Grosscup, for appellant.
Benson & Hall, for respondent.

HADLEY, J. This action was brought to recover damages for injuries received by respondent while working as a brakeman in the railroad yards of appellant at Seattle. Respondent had just climbed to the top of the rear car in a

*As to the duty of railroad companies, as employers, to furnish safe foreign cars, see foot-note appended to *Anderson v. Erie R. Co.* (N. J.), 8 R. R. R. 19, 31 Am. & Eng. R. Cas., N. S., 19.

As to employees' assumption of risks from obvious dangers, see foot-note appended to *Harrison v. Detroit, Y. A. A. & J. Ry.* (Mich.), 13 R. R. R. 187, 36 Am. & Eng. R. Cas., N. S., 187; *Dowd v. Erie R. Co.* (N. J.), 12 R. R. R. 368, 35 Am. & Eng. R. Cas., N. S., 368.

Assumption of risks from defective appliances, see foot-notes appended to *Carson v. Southern Ry. Co.* (S. Car.), 12 R. R. R. 337, 35 Am. & Eng. R. Cas., N. S., 337.

Assumption of risks by servants, general principles, see foot-note appended to *Illinois Terminal R. Co. v. Thompson* (Ill.), 12 R. R. R. 683, 35 Am. & Eng. R. Cas., N. S., 683.

moving section of 19 freight cars. As he was in the act of rising after reaching the top of the car, the speed of the engine was suddenly checked, and the consequent jerk caused him to lose his balance and fall. He fell off the car and received severe injuries about the foot. The car from which he fell was a circus car, which had been received by appellant from another line of road. The complaint charges that all reasonably safe freight cars and all freight cars in general used in the state of Washington and throughout the United States are provided with hand-grabs on the tops of the cars, which are, in nearly all cases, fastened at least 12 inches from the ends of the cars, and generally 15 or more inches therefrom; that upon the car from which respondent was thrown the hand-grab was negligently and dangerously placed within 3 inches of the end of the car; that appellant had possession of the car two days immediately preceding the time respondent was injured, and that it knew, or by the exercise of reasonable care could have known, that said hand-grab was dangerously near the end of the car, but that appellant neglected to notify respondent thereof, and that he was not aware of the same until the time he was injured. The answer avers that respondent was familiar with the nature of his duties as switchman and brakeman, and was familiar with appellant's business of receiving into its yards at Seattle cars of other roads of various styles of construction; that the style of construction of the circus car mentioned was as open and apparent to respondent as to any of the officers or agents of appellant; and that the car was in good order and condition. The cause was tried before the court and a jury, and a verdict was returned in favor of respondent. Judgment was thereupon entered for respondent, and this appeal is from the judgment.

It is assigned that the court erred in refusing to grant appellant's motion for nonsuit at the close of respondent's case, and also in refusing at the close of all the testimony to withdraw the case from the jury and enter judgment for appellant. It is the contention of appellant that the evidence showed no negligence upon its part. It is appellant's duty to receive and transfer cars from other lines of railroad. This duty is enjoined by statute, and is in pursuance of the Constitution of this state. See section 13, art 12, Const. Wash. and sections 4318, 4319, 1 Ballinger's Ann. Codes & St. Respondent admits that such is appellant's duty, and that it is also required to receive cars of different construction from that of its own; but that the duty rests upon appellant to inspect all cars received, and to warn its employees against dangers from any unusual construction. There is no contention that the car in question was in any way out of repair. Negligence is predicated entirely upon the manner of construction in the placing of the grab-bar and upon appellant's omission to notify respondent thereof. The ladder upon this

car was at the end, whereas the ladder upon the ordinary Northern Pacific car is at the side. The grab-bar upon Northern Pacific cars is usually located 15 inches or more from the end of the car, while upon this car it was about 3 inches. The evidence shows that certain other cars are in the particulars mentioned constructed similarly to this circus car. Such is true of refrigerator and fruit cars, and also of Armour & Co. cars. Respondent says he has not observed all of these, but he has seen the refrigerator cars. He thinks, however, that the hand-grab upon those he has seen was usually located from six to eight inches from the end of the car. He has had a number of years' experience as a brakeman, and his testimony shows that during that experience he has observed that cars of construction similar to this one are received and transferred from other lines. The peculiar danger which he urges from the situation of the hand-grab in this instance is that it was so near the end that it did not enable him to reach forward and pull himself upon the car, as if it had been located further from the end. He says, if it had been located further from the end, he would have been forward upon the car when rising, and that when he lost his balance he would have fallen upon the car, and not upon the ground. His testimony shows, however, that the situation was open and apparent to him when he reached the top of the ladder. He saw the location of the grab-iron, and took hold of it, but at the same time took hold of the running board to help himself forward. He admits that the grab-iron was of no assistance to him in rising, and would not have been if located further forward; its only use being to assist in pulling himself upon the car. It was after he was upon the car, and while undertaking to rise, that the accident happened. When respondent saw the situation as he ascended the ladder, he then assumed the risk as one of the incidents to his employment. If the grab-bar had been out of repair, and its condition not apparent, and if he had been injured by reason thereof, the case would have been different. The duty rested upon appellant to inspect foreign cars to see that no hidden dangers, such as want of repairs, involved its employees; and if the original construction were such as confronted the employee with unusual and probably dangerous conditions which were not apparent to him, doubtless the same duty would rest upon appellant to inspect even foreign cars as to such unusual construction, and to warn employees thereof. We are unable to see that any negligence of appellant appears from the evidence. The car was received in the course of appellant's duty as a common carrier. As such it from time to time received cars of different construction, and respondent knew that such was the fact, particularly in relation to the location of the hand-grab. When he saw the situation, he was as fully informed thereof as if he had been previously notified by appellant. With such full knowledge in

either case he must have assumed the risk attendant upon that particular construction. In *Michigan Central R. Co. v. Smithson* (Mich.) 7 N. W. 791, the same principle was involved. At the ends of the cars were what are known among railroad men as "deadwoods." The defendant's cars in that case were supplied with what are called "single deadwoods," while the foreign car had "double deadwoods." The plaintiff in the case was injured while attempting to couple the foreign car to one of his own road. He urged that the use of double deadwoods was unusual and dangerous, and that his employer was negligent in permitting their use upon the foreign car without notifying its employees thereof. Judge Cooley, who wrote the opinion, said: "But we have had produced for our inspection on the argument a model of the double deadwoods which caused the injury, and it seems impossible to give to the coupler any better or more effectual notification of their presence, and of the difference from those belonging to the defendants, than their very form necessarily gives of itself. The difference is very marked and striking, and it is quite impossible to couple the double deadwoods, or to approach them for the purpose, with any degree of attention, without observing it. This is so whether the coupling is done in the daytime or nighttime, for in the night every switchman has his lantern with him, or should have it on all occasions. If, therefore, a switchman were to declare that he had attempted to couple the double deadwoods without noticing how they differed from the cars of defendant, the conclusion would be inevitable that he had gone heedlessly in the performance of a duty requiring great care, and that he had not allowed his eyes to inform him what was before him. Moreover, the business of the road was of itself a notification that many differences requiring attention in coupling were to be encountered by switchmen and brakemen. The Michigan Central is a great commonway for the cars of all the railroad companies of the country, and every man in employ of the defendant, if he has ordinary intelligence, is perfectly cognizant of the fact. He knows, too, that the cars of the several railroad and transportation companies differ, and that at one time or another all these differences may appear in the cars he may be called upon to couple or uncouple. Every train is likely to have several kinds, and he cannot assume, as he passes from one to another, that the two will be alike; much less that the whole train will be. To notify him especially of the differences would not only be troublesome and expensive, and oftentimes, as above explained, confusing, but it would be a work of supererogation; for any man capable intelligently of performing the duty would be no wiser after the duty than before, and a man who would not heed the information the very nature and course of the business would impart to him would be protected by no notice. The best notice is that

Hayes v. New York, etc., R. Co

which a man must of necessity see, and which cannot confuse or mislead him. He needs no printed placard to announce a precipice when he stands before it." The above remarks seem to be peculiarly applicable to the conditions in the case at bar. As Judge Cooley reasoned in that case, so in this one the very sight of the grab-bar itself, lying immediately before respondent as he started to climb upon the top of the car, was the most effectual notification which he could have received of its location and of the situation which he was required to meet. See, also, *Thomas v. Missouri Pac. Ry. Co.* (Mo. Sup.) 18 S. W. 980; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. Ed. 150; *Peirce v. Bane*, 80 Fed. 988, 27 C. C. A. 361; *Baldwin v. C., R. I. & P. R. Co.*, 50 Iowa, 680. The cases cited by respondent involved out-of-repair conditions of the foreign car, as well as matters of original construction, and, as we have already intimated, it is the duty of the receiving company to inspect and guard against defects of the foreign car from lack of repairs, and which may not be open and apparent to the employee. No out-of-repair conditions being present in the case at bar, the said authorities do not seem to reach the point now before us.

For the foregoing reasons we think no negligence of appellant appears, and we believe the court erred in not withdrawing the case from the jury and in not granting judgment for appellant. The judgment is reversed, and the cause remanded, with instructions to enter judgment for appellant dismissing the action.

MOUNT, C. J., and FULLERTON and DUNBAR, JJ.,
concur.

HAYES v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, Jan. 4, 1905.)

[72 N. E. Rep. 841.]

Injury to Employee—Failure to Use Cleats Furnished.*

Where the work of transferring freight to a freight car through several intervening freight cars, using skids between the cars, is left to a gang of workmen, the employer furnishing sufficient materials for placing cleats on the skids to keep them from slipping, the employer is not liable for injuries to one of the workmen resulting from the absence of such cleats.

Same—Performance of Duty to Furnish Cleats.

Evidence in an action by an employee for injuries resulting from the absence of cleats on a skid used in transferring freight from one car to another, etc., held sufficient to show that defendant furnished its employees sufficient materials with which to cleat the skids.

*As to whether master is liable for injuries to employees from use of improper appliances, or failure to use appliances, where proper appliances have been furnished, see *Gauges v. Fitchburg R. Co.* (Mass.), 10 R. R. R. 398, 33 Am. & Eng. R. Cas., N. S., 398 (master not liable for injury to employee from use of defective appliance and tools selected for his own use by foreman, where proper ones have been furnished).

Hayes v. New York, etc., R. Co

Exceptions from Superior Court, Suffolk County; Chas. W. Bell, Judge.

Action for personal injuries by one Hayes against the New York, New Haven & Hartford Railroad Company. There was judgment for defendant, and plaintiff brings exceptions. Exceptions overruled.

Walter B. Grant, for plaintiff.

Choate, Hall & Stewart, for defendant.

LORING, J. The plaintiff was one of a gang of workmen employed in loading freight from the house where it was received by the defendant into the cars which were to carry it to its destination. There were several tracks laid parallel with the side of the freight house, and the course of business was to use the intervening cars as a bridge to reach a car in the train on the outside track. Skids were placed from the house to the first car, and between cars on the intervening tracks. On the day of the accident the plaintiff was directed to carry a large case on his truck to the car on the fourth track. The case was so large that it had to be placed on the iron end of his truck, in place of being loaded on the inside of that end; and the plaintiff had to move forward in a stooping position in pulling the truck, to prevent it from tipping off the end of the truck. As he passed over the skid between the car on the third and that on the fourth track, the skid slipped, and the plaintiff, the skid, and the case he was pulling, fell to the ground, causing the injuries complained of. This was the first time he had been over this skid on that day. The jury were warranted in finding that the skid slipped because it was not cleated. On the conclusion of the plaintiff's evidence the presiding judge directed a verdict for the defendant, and the case is here on an exception to that ruling.

There was evidence that the defendant's rule was that all skids should be cleated. The skids in house No. 7 were fitted with iron pins at each end of the skid to keep the skid in place. But those in use at house No. 6—the house in question—had no pins. The practice had been to nail down cleats across the ends of these skids, to keep them from slipping when the cars were not of the same height, but not to cleat them when they were even in height. It also appeared that the matter of laying skids and of cleating them was left to the workmen. The defendant's contention is that it was not liable for the skid in question not having been cleated; that it had left that matter to the workmen, and had provided them with the necessary material.

So far as the skids were concerned, over which the plaintiff had to go from the warehouse to the car on the outside track, the safety of the plaintiff was dependent on the temporary adjustment of instrumentalities in the course of the work on which the plaintiff was employed. If the employer leaves

Hayes v. New York, etc., R. Co

such a matter to the workmen, furnishing them with the means of making the instrumentality safe, his duty to his employees is performed. Without citing all the cases, it is enough to refer to *Johnson v. Towboat Co.*, 135 Mass. 209, 46 Am. Rep. 458, and to the last cases on the point; *Miller v. N. Y., N. H. & H. R. Co.*, 175 Mass. 363, 56 N. E. 282; *Haskell v. Cape Ann Anchor Works*, 178 Mass. 485, 487, 59 N. E. 1113.

One witness testified that the defendant had not supplied hammer, nails, and boards for this purpose; but on cross-examination he testified that "all that you need to cleat a board is a little piece of wood nailed down so as to keep the running board steady. Sometimes there are lots of blocks there. You can find a few blocks and pieces of wood about the house, and they could get nails and things to drive them in if they wanted. * * * There is generally lumber on the outside platform, right by the door of the house, and any one could get that lumber that wanted to." Another of the plaintiff's witnesses testified on direct examination: "There were no special boards furnished for that purpose. He would go into the house and find some kind of a board and break it up for a cleat. There would be boards that he could find there, and sometimes he might have a hard time in finding any. Sometimes he might have to go outside of the house to get the board, but he would go where it was handiest to find them—that is, find them the quickest way he could do so; that the gang would keep working." Again: "Upon the day of the accident he didn't have any hammer. No carman in that house carried a hammer especially. He had to go to different parts of the house to get nails and hammer, and, if he saw a board that he thought needed cleating, he would go and hunt up the hammer and nails. He would have to go to different parts of the house. The hammer and nails were lying in a box." And on cross-examination: "There were plenty of nails in the house, and, though he had none with him, he could get them, if he wanted to, and he could get all the boards that he wanted. There were plenty of them." On this evidence, we are of opinion that the defendant had furnished the material necessary to cleat the skids. See, in this connection, *Callahan v. Phillips Academy*, 180 Mass. 183, 62 N. E. 260. What distinguishes this case from *Murphy v. N. Y., N. H. & H. R. Co.* (Mass.) 72 N. E. 330, is that in that case the matter of securing the skid was left to a superintendent, and there was evidence that he was negligent in case of the skid there in question.

Exceptions overruled.

McKIVERGAN v. ALEXANDER & EDGAR LUMBER COMPANY.

(Supreme Court of Wisconsin, Jan. 31, 1905.)

[102 N. W. Rep. 332.]

Master and Servant—Fellow Servants—Liability of Railroads—Construction of Statutes.*

Rev. St. 1898, § 1816, which is a part of chapter 87, concerning railroads, makes every railroad company liable for damages sustained by employees, caused by the negligence of other employees. Other provisions of the chapter relate exclusively to railroad corporations doing the usual business of a public or commercial railroad. Thus provision is made for equality of transportation rates, for the furnishing of cars on demand, for the maintenance of guards and fences, and for subser-vience to regulations for the shipment of grain, carrying of live stock, etc. The power of exercising the right of eminent domain is also given to railroads included within the purview of the chapter. Section 1861 defines the phrase "railroad corporation" as embracing any company, corporation, or person managing or operating a railroad, whether as owner, contractor, mortgagee, assignee, or receiver: *held*, that section 1816, notwithstanding section 1861, embraces within its provisions only railroads engaged in a general railroad business for the carriage of passengers and freight, and has no application to a private railroad operated in connection with a logging and lumber business.

Appeal from Superior Court, Douglass County; C. Smith, Judge.

Action by E. J. McKivergan against the Alexander & Edgar Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

This action was brought to recover damages which plaintiff claims to have suffered by the negligence of defendant. The defendant is a corporation under the laws of Wisconsin, "organized for the purpose of carrying on a general logging, lumbering, and manufacturing business, buying and selling real estate and merchandise." In connection with defendant's business, it operates a private railroad. The operation of its railroad business extends from Iron River, Bayfield county, to a place one mile west of Brule—a distance of about 12 miles over the tracks of the Northern Pacific Railway Company, and thence over their private side track for about four miles, with spurs projecting into adjacent timber lands. In conducting its railroad it used two geared locomotives in hauling logs to the side tracks, and two regular locomotives in hauling timber to its mill of Iron River. It also used Russel logging and other cars for this purpose, part of which were leased from the Northern Pacific Railroad. The Northern Pacific track used by defendant is a part of its main line, and, while running over its track, defendant operates under orders of the Northern Pacific Company. It used this track daily for the passage both ways of two or three trains, of

*For the decisions in this series on the subject of logging railroads, see foot-notes appended to Healy Lumber Co. v. Morris (Wash.), 12 R. R. 171, 35 Am. & Eng. R. Cas., N. S., 171.

McKivergan v. Alexander & Edgar Lumber Co

from 12 to 16 cars. At the time of the accident complained of, plaintiff was in defendant's employ, and engaged as brakeman in the operation of defendant's logging trains. The injury occurred while plaintiff was in the discharge of his duty as such brakeman, and while in the act of making a coupling between one of defendant's logging cars and the engine. It is alleged that while plaintiff was exercising ordinary care in performing his duty, in attempting to place and adjust the link to make the coupling, the engineer carelessly and negligently caused the cars to move towards plaintiff and against the logging car, causing the injury to his fingers and hands. The case was tried and submitted to a jury, who found for the plaintiff, and awarded him damages. Thereafter the defendant moved for judgment in its favor notwithstanding the verdict, which motion the court granted, and awarded judgment accordingly. This is an appeal from such judgment.

W. P. Crawford (Crownhart & Foley, of counsel), for appellant.

Ross, Dwyer & Hill, for respondent.

SIEBECKER, J. (after stating the facts). The court awarded judgment dismissing the complaint, notwithstanding the verdict, for the reason that no actionable negligence had been shown against defendant. The ruling was based upon the ground that the liabilities established by the provisions of section 1816, Rev. St. 1898, did not attach to defendant. This section provides: "Every railroad company operating any railroad which is in whole or in part within this state shall be liable for all damages sustained within the same by any of its employees without contributory negligence on his part * * * (2) while any such employee is so engaged in operating, running upon or switching, passenger, freight, or other trains, engines or cars, and while engaged in the performance of his duty as such employee, and which such injury shall have been caused by the carelessness or negligence of any other employee, officer or agent of such company in the discharge of or for failure to discharge his duties as such." It is contended by plaintiff that in construing this statute the phrase "railroad company," as used in this section, is to be applied as the phrase "railroad corporation" is used in section 1861, Rev. St. 1898, which is as follows: "The phrase 'railroad corporation' as used in the statutes, may be taken to embrace any company, association, corporation or person, managing, maintaining, operating or in the possession of a railroad, whether as owner, contractor, lessee, mortgagee, trustee, assignee or receiver." Adopting this interpretation leads to the inquiry, upon whom did the Legislature intend to impose the liabilities prescribed by the terms of section 1816, Rev. St. 1898? Were its terms only to apply to railroad corporations doing a public service, commonly

known as "commercial railroads," or was it intended to impose these liabilities on every person, company, or corporation operating trains, engines, or cars, regardless of whether such business was in the nature of a public service as common carrier, or devoted exclusively to a private enterprise, including no public service. The question is not so clear and plain as to be free from all difficulties. If the statute be held to apply to the character of the employment, then no valid reason is suggested why it should not be held to cover all classes of public and private railroads, regardless of the nature of their business. The contents of this particular section might, in its literal sense, permit of such an application. This, however, would put it out of harmony with the other provisions of chapter 87, Rev. St. 1898, covering legislation "on railroads" in this state. The best way to ascertain the legislative intent, under such circumstances, is to consider all the legislative provisions on the subject of which the provision is a part; keeping in view the occasion and necessity of the law, and the object sought to be accomplished. An examination of the provisions of this chapter discloses numerous provisions pointing to the fact that the legislation therein contained referred exclusively to railroad corporations doing the usual business of a public or commercial railroad. Among some of its provisions are those prescribing equality of rates for the transportation of persons or of property for a like service; the obligation to furnish cars for the transportation of property within a reasonable time after notice; the obligation to follow the regulations prescribed for the shipment of grain, carrying of live stock, the stopping of trains, the maintenance of guards and fences, and other requirements for the protection and safety of the public. An important and distinguishing characteristic of railroads included within the purview of this chapter is to grant to every corporation organized under it the power of exercising the right of eminent domain in its quasi public character. In the case of *C. & N. W. Ry. Co. v. Oshkosh, etc., R. Co.*, 107 Wis. 192, 83 N. W. 294, it was held, in effect, that these provisions make it clear, and must remove any doubt, that in the legislative intent a railroad corporation, within the provisions of this chapter, is one engaged in a general railroad business "for the carriage of passengers and freight—a common carrier in its fullest sense—and to it [are] given the fullest provisions for condemnation of lands, as compensation for the great public duties imposed upon and assumed by it." The difference between such a railroad and one used as an incident to conducting a private business is readily perceived and understood, without elaboration. The objects and uses of the one are far removed from those of the other, though the instruments of operation, such as tracks, cars, and engines, may be common to both. Since the provisions of all these sections of this chapter, aside from section 1816, plainly and

Illinois Cent. R. Co. v. Jolly

unmistakably include commercial railroads only, is there any conceivable ground for holding that this section includes private as well as commercial railroads or common carriers? We have discovered nothing which would warrant the court in enlarging the meaning of the terms of this section beyond the plain meaning of the same terms in the other provisions of this chapter. Every argument for so extending its terms applies with equal force to their use throughout other provisions on this subject. We must conclude that section 1816 is intended to embrace within its provisions only such railroad companies as are contemplated by chapter 87, Rev. St. 1898, namely, one engaged in a general railroad business for the carriage of passengers and freight; that is, a common carrier in the fullest sense. From this it necessarily follows that defendant does not come within the terms of the statute. *Beeson v. Busenbark*, 44 Kan. 669, 25 Pac. 48, 10 L. R. A. 839; *Manhattan Trust Co. v. Sioux, etc., Co. (C. C.)* 68 Fed. 82; *Ellington v. Beaver, etc., Co.*, 93 Ga. 53, 19 S. E. 21.

The case of *Roe v. Winston*, 86 Minn. 77, 90 N. W. 122, is cited to our attention. In this case it appeared that plaintiff was injured in this state while in defendant's employ as brakeman on a private train used in connection with defendant's business of general railroad construction work, and the court held he was entitled to recover under the provisions of section 1816. His right to recover was predicated on the ground that the provisions of this section applies to a private railroad business. The decision follows the construction adopted by the court in construing a similar Minnesota statute, holding that it was applicable to the business of a private as well as a public service railroad. We are unable to avoid the conclusion that this construction is opposed to the manifest intent of the Legislature, as embodied in this section and the other legislation on the subject.

The judgment is affirmed.

ILLINOIS CENT. R. CO. v. JOLLY.

(Court of Appeals of Kentucky, Jan. 12, 1905.)

[84 S. W. Rep. 330.]

Trial—Remarks of Counsel—Argument to Jury—Appeal.

Remarks of counsel for plaintiff in argument that the plaintiff had obtained a judgment on a former trial, that it had been reversed by the higher court on a technicality, and that defendant was then preparing to appeal from any verdict that might be rendered and obtain another reversal, were improper.

Same—Same—Same—Prepared Statements Signed by Railroad Employees.*

On trial of an action against a railroad for personal injuries, where

*For authorities in this on the subject of arguments and remarks of counsel as to the credibility of witnesses, see *Leslie v. Jackson & S.*

Illinois Cent. R. Co. v. Jolly

there was evidence that when accidents occurred the railroad employees were furnished with prepared statements, which they were required to sign, a comment on such fact in the argument by counsel for plaintiff was not erroneous, except as to a statement therein that the employees must answer "Yes" in order to hold their jobs, and, if they answered "No," "they walk the plank."

Appeal from Circuit Court, Ohio County.

"To be officially reported."

Action by Elizabeth Jolly against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

H. P. Taylor, J. M. Dickinson, and Pirtle & Trabue, for appellant.

Genn & Ringo, E. E. Kelley, and John B. Wilson, for appellee.

NUNN, J. This is the second appeal of this case. The opinion in the first appeal is published in 78 S. W. 476, 25 Ky. Law Rep. 1735. The case was then reversed for an erroneous instruction and for the failure to give an instruction for contributory neglect. Another trial was had in the lower court, and appellee obtained a verdict for \$1,400, from which appellant appeals, and assigns many reasons for a reversal.

The facts with reference to the extent of appellee's injuries and the manner and circumstances under which she received same, are stated in the former opinion, and we deem it unnecessary to reiterate same. The instructions given by the court on the last trial were in conformity with the former opinion. We deem it unnecessary to here consider any of the many reasons advanced by appellant for a reversal, all of them being without merit, except as to the amount of the verdict, and the conduct of appellee's counsel during the trial, and especially in his closing argument to the jury. It appears from the bill of exceptions that during the taking of testimony appellant's counsel made objection to a certain question and answer, when counsel for appellee arose with the remark, "It is the purpose of the plaintiff to follow this defendant to the Court of Appeals again." In the closing argument appellee's counsel used the following language: "That it had been some four or five years since this suit was brought; that the action had been once reversed in the Court

Traction Co. (Mich.), 9 R. R. R. 660, 32 Am. & Eng. R. Cas., N. S., 660 (remark of counsel, in action for injury to passenger, that witnesses for adverse party were "cattle," did not constitute prejudicial error). See note appended to *Rudiger v. Chicago, etc., Ry. Co. (Wis.)*, 12 Am. & Eng. R. Cas., N. S., 196; *Wimber v. Iowa Cent. Ry. Co. (Iowa)*, 23 Am. & Eng. R. Cas., N. S., 476 (right to argue interest of witness, as an employee, to conceal his own negligence, in action for injury to another employee); *Perry v. Western N. Car. R. Co. (N. Car.)*, 21 Am. & Eng. R. Cas., N. S., 659; *Mackrall v. Omaha & St. L. R. Co. (Iowa)*, 19 Am. & Eng. R. Cas., N. S., 59; *Mott v. Detroit, etc., Ry. Co. (Mich.)*, 15 Am. & Eng. R. Cas., N. S., 113; *Story v. Concord & M. R. R. (N. H.)*, 20 Am. & Eng. R. Cas., N. S., 90.

Illinois Cent. R. Co. v. Jolly

of Appeals on a technicality, and that the railroad company was furnished with skilled lawyers and stenographers for the purpose of catching at every little thing, not larger than that (demonstrating upon his finger's end), for the purpose of again taking the case to the Court of Appeals and reversing the judgment." Counsel further stated to the jury as a fact in his closing argument as follows: "When railroad accidents occur railroad employees are furnished with statements already prepared, and that such employees are required to answer each of the statements 'Yes' in order to hold their job, and, if they answer 'No,' they walk a plank." And again, counsel for appellee used the following language: "That this action had been in the courts some four or five years, and that the railroad company was furnished with lawyers and stenographers for the purpose of catching at every little thing to take the case to the Court of Appeals again, in order to defeat the claim by reversing it, it having heretofore been reversed in the Court of Appeals on a technicality." It appears from the bill of exceptions that appellant's counsel objected to the foregoing remarks made by appellee's counsel, and asked the court to exclude the same from the jury, which the court refused to do, and appellant excepted.

Every case in court should be tried upon the law as given by the court and the facts adduced by the evidence. Every litigant is entitled to this character of trial. The courts should be careful to prevent improper conduct and language of counsel for either side for the purpose of unduly influencing the minds or inflaming the passions and prejudices of the jury trying the case. Counsel have the right, of course, to argue the evidence, and give their opinion and construction thereof, if within the pale of reason. But when counsel, in the heat of argument, overstep the bounds, and objection is made by the opposing side, the court should exclude the improper matter. The remarks of appellee's counsel that this lady had obtained a judgment on the former trial that it had been appealed from, and reversed by this court upon a technicality; and that appellant was then preparing, with the assistance of skilled lawyers and stenographers, to appeal from any verdict that might be rendered and obtain another reversal—were improper. The case should have been tried without the jury being apprised of the result of the previous trial and the action of the Court of Appeals thereon.

The statement of appellee's counsel to the jury "that when railroad accidents occur railroad employees are furnished with statements already prepared, and that such employees are required to answer each of the statements," was not improper, for the evidence tended to show this fact. At least, there was some evidence upon this subject. But the latter part of the statement, to the effect "they must answer 'Yes' in order to hold their job, and, if they answer 'No,' they walk

Texas & Pac. Ry. Co. v. Swearingen

a plank," was wholly unwarranted, there being no evidence in the record to authorize it. Appellee's counsel stated this as a fact. He did not profess that it was merely an opinion or impression of his own; and such language was calculated to inflame the minds of the jury against appellant, and to weaken the strength of the evidence of its employees who had testified before them. See *L. H. & St. L. Ry. Co. v. Morgan*, 62 S. W. 736, 23 Ky. Law Rep. 121. In that case appellee's counsel in the closing argument made use of the following language: "The railroad can appeal this case, but the plaintiff, Morgan, is a poor man, and has no money to appeal with, and will have to accept what you do, but the railroad has the money to appeal this case, and will do so." Commenting on these remarks, this court said: "The court cannot afford to take notice of all remarks of counsel that are not strictly within the record. There is a latitude allowed in oral argument, but it should not extend as far as was done in the quotation." Also, see, *L. & N. R. R. Co. v. Hull*, 68 S. W. 433, 57 L. R. A. 771, 24 Ky. Law Rep. 375. In that case the court reversed the judgment on account of improper remarks of counsel for appellee in his closing argument, the language used being somewhat similar to that in the case at bar. The court in that case said: "It was improper for the attorney to go outside of the evidence heard by the jury and the law of the case as given by the court. It was especially improper for him to state of his personal experiences, which had not been testified to, and were calculated to prejudice the jury against the defendant, or swell the amount of the verdict. Considering the size of the verdict in connection with the argument of the counsel, we are clearly of the opinion that a new trial should be granted." On the first trial of this case appellee obtained a verdict for \$881; on the last for \$1,400. Considering the increase in the amount of the last verdict and the remarks quoted, we are constrained to believe that these improper remarks in all probability prejudiced the minds of the jury against appellant. In view of the amount of the last verdict, coupled with the improper remarks referred to, we are of the opinion that appellant should be granted a new trial.

The judgment is reversed, and cause remanded for a new trial under proceedings consistent herewith.

TEXAS & PACIFIC RAILWAY COMPANY, Plff. in Err., v. W. W. SWEARINGEN.

(Submitted November 3, 1904, Decided December 19, 1904.)

[25 Sup. Ct. Rep. 164.]

Injury to Switchman—Proximity of Scale Box to Rails—Assumption of Risks—Evidence—Contract of Employment.

Excerpts from an application for employment as a railway brakeman tending to show the applicant's knowledge of the generally hazardous

Texas & Pac. Ry. Co. v. Swearingen

nature of the employment, and of the necessity of the exercise of care in working in and about the instrumentalities used by the railway company, and his agreement to acquaint himself with the location of bridges and other structures on the line, are inadmissible in evidence on the issue whether he had assumed the risk, when subsequently employed as a switchman, incident to the location of a scale box in dangerous proximity to the rails.

Same—Same—Duty to Furnish Safe Place to Work.

A railway company cannot be said, as a matter of law, to have performed its duty to use due care to provide a reasonably safe place for the use of switchmen in its employ when it has located scales where the tracks were only the standard distance apart, leaving a space of less than 2 feet for the movements of a switchman between the side of a freight car and the scale box, when encumbered with a lantern employed for signal purposes,—especially if the necessity of the situation did not require the scales to be constructed in that way.

Same—Same—Assumption of Risk.*

Knowledge of the increased hazard resulting from the dangerous proximity to the rails of a railway scale box cannot be imputed to a switchman simply because he was aware of the existence and general location of the box.

In Error to the United State Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western District of Texas in favor of plaintiff in an action to recover damages for personal injuries, which had been removed to that court from the District Court of El Paso County, in that state. **Affirmed.**

See same case below, 59 C. C. A. 31, 122 Fed. 193.

The facts are stated in the opinion.

Messrs. John F. Dillon, D. D. Duncan, and T. J. Freeman for plaintiff in error.

Mr. Leigh Clark for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court:

This suit was commenced in a state court by W. W. Swearingen, the defendant in error, and, on the application of the defendant, the Texas & Pacific Railway Company, was removed to the circuit court of the United States as one arising under the laws of the United States, because the railway company was chartered under an act of Congress.

The action was to recover damages for personal injuries sustained by reason of the alleged negligence of the defendant company, in whose service at the time of the injury the plaintiff was employed as a switchman. The negligence alleged on the part of the company was the existence, in close proximity to a switch track, of a scale box, by striking against which the plaintiff was injured whilst doing duty as a switchman. In addition to a general denial the railway com-

*See foot-note appended to *Illinois Terminal R. Co. v. Thompson* (Ill.), 12 R. R. R. 683, 35 Am. & Eng. R. Cas., N. S., 683; *Withee v. Somerset Traction Co. (Me.)*, 12 R. R. R. 46, 35 Am. & Eng. R. Cas., N. S., 46.

pany especially pleaded that the scale box in question was at a safe distance from the track on which the plaintiff was hurt when working, and, moreover, that the plaintiff had assumed the risk, if any, arising from the situation of the scale box, and had, in any event, been guilty of contributory negligence. There was a verdict and judgment for the plaintiff, and an affirmance of such judgment by the court of appeals. 59 C. A. 31, 122 Fed. 193.

The assignments of error are based, first, on a ruling of the trial court in rejecting evidence; second, on the refusal to direct a verdict; and, third, on an exception taken to the charge given to the jury. To pass upon them requires an appreciation of the proof, and therefore, before coming to consider the assignments, we summarize the testimony.

The accident occurred after dark on the evening of February 7, 1902, in the switch yards at El Paso. It was shown that in that yard there were several tracks. One track, No. 1, ran over the bed of the scales in question. On the right of this scale there was what was called a scale box, which rose to about the height of 6 feet, and was about 5 feet wide and 18 inches deep. On the other side of this structure there was a track described as track No. 2, and beyond this, to the right, were two other tracks, known respectively as track No. 3 and track No. 4. The space between a ladder on the side of a freight car when moving on track No. 2 and the scale box in question was shown by the evidence to be only 19½ inches.

The plaintiff testified concerning the accident as follows:

"I was hurt on the evening of the 7th of February, 1902, while working as a switchman after dark, at about 6 o'clock and 45 minutes.

"I was a day switchman, but we worked until after dark.

"My duties as a switchman was to assist in the moving, placing, and switching of cars, coupling and uncoupling them, and making up trains, and generally to obey the order of Yardmaster Moore, under whom we were working, and my duties also required me to ride on the cars while they were being moved.

"On this night we were making up a transfer to take to the Southern Pacific Railway, and the cars we had to get were on No. 2 track. My station was with the engine, called 'following the engine.' I worked up near the engine.

"The engine was at the west end of the yards, west of track No. 2, with me with it, and it backed down east into No. 2 track, with me riding on the footboard at the east end of the engine, to get these cars, and we passed the scale box, although I did not see it, and reaching the cars I coupled the engine to them, and not getting a signal from the yardmaster, who was still farther east of me, as was also the other switchman, Williams, I walked east down the string of cars about two car lengths, and getting the signal I passed the same to the

engineer, and the engine and cars started up again going west so as to go out on another track, and as the cars started I got up on a box car to ride down past the switch at the west end of track No. 2, so as to throw the switch and let the train on another track.

"There is a ladder on the side of a box car, and a step called a stirrup under the ladder under the bottom of the car, and I was holding on to the ladder with my hands [illustrating by holding his hands above his head, as if climbing a ladder], and my lantern was hanging on my right arm, and I was looking back east for a signal from the yardmaster, as it is my duty to do. I do not know whether he wanted to give one or not, but it is my duty to be on the lookout, although I do not have to look in his direction all the time, when my right shoulder struck the scale box, and I fell down between the scale box and the cars, and I was dragged and badly injured. We had probably eight or ten cars at the time, and I was riding properly and hanging out a little from the car, which is proper, and I was on the north side of the car, which is also proper, so as to signal the engineer."

The employee who built the scales testified as follows:

"It is my business to know how much a car passing on a side track will clear the scale box, and these tracks at this place are standard gauge apart, and the scale box is standard, and as I had to put the scale box there to facilitate business and for convenience, I had no more room because the lever of the scale is a certain length to get the fulcrum. The tracks are standard, and are not further apart because there is no more room to put them farther apart.

"The distance that I put this scale box from track No. 2 is standard, and is considered a safe and proper distance in putting in scales where the tracks are standard gauge apart.

"I am bound to put my scales in according to the length of the lever, and if tracks are already there and are standard distance apart I have a uniform and standard distance from the tracks.

"We have side tracks at most places on each side of the scales. The tracks in this yard are standard gauge apart, and where ground is scarce we have to economize in space; but where ground is plenty the tracks can be further apart."

The evidence for the company also showed that the scales in question had been erected a number of years prior to the happening of the accident and after tracks Nos. 1 and 2 were built. The superintendent of terminals of the defendant company testified that "south of track No. 4 there is a space left for four or five more tracks." The same witness also stated that the customary position of a switchman while riding on a car and ladder "is to swing out from the car with his body," and that "a well-developed man cannot safely

pass by the scale box on track No. 2, while riding on a side of a car on the ladder, if he hangs out from the car."

There was evidence that at other yards than the one in question the distances from the side of a standard box car to adjoining scale boxes varied from 16 inches to 168 inches.

Testimony was introduced tending to show that the plaintiff, before he was hurt, knew of the proximity of the scale box to track No. 2. Concerning his employment and knowledge of the location of the scales, plaintiff testified that he had made one trip as extra brakeman in the service of the railway company in January, 1900; that in December, 1901, as brakeman, he made about one trip between El Paso and Toyah; that he had worked in the El Paso yards as extra switchman two nights and three days in January, 1902, and went to work there regularly as switchman on February 1, 1902. He denied any recollection of ever having worked on track No. 2 during his employment in January, 1902, and, referring to his employment in the early days of February, 1902, plaintiff says:

"During the seven days I worked for defendant we never used this No. 2 track at the west end, or near the scales, and I never saw a car on track No. 2, opposite the scales, and never had my attention called to the distance between the track and scale box. I never measured or approximated the distance to it. Nothing ever occurred to attract my attention to it.

"I knew we had to pass the scale box at the time I was hurt, so as to get to the switch beyond, but I was not thinking about it, and I did not see it when we passed it going in after these cars.

"The switch engine had a headlight lighted at both ends, and I was on the footboard at the rear of the engine, which put me in front while we were backing into track No. 2 after the cars, but the headlights were not very clean or bright.

"There was nothing to hide the scale box from my view; it was perfectly open and apparent."

Plaintiff further testified:

"I knew the location of the scale before I was hurt. I knew it was between tracks Nos. 1 and 2, but I did not know anything with reference to its proximity to track No. 2, and did not know it was dangerously close to track No. 2.

"At the time I was hurt, I had no knowledge of the distance between the scale box and No. 2 track.

"I set cars on the scale on track No. 1 to be weighed, but I would be on the north side of the cars on track No. 1, and as the scale box is on the south side I could not see it. I had nothing to do with the scale box and had no business around it.

"I first learned the exact distance between the scale box

and the nearest rail of track No. 2 a few days ago, when I went down and measured it at your (referring to plaintiff's attorney) recommendation.

"I was never warned about the danger of getting knocked off of cars by this scale box, and at the time I was hurt I was attending to my work, and thinking about my duties, and looking for a signal from the yardmaster, and was not thinking about the box. I did not see it immediately prior to the time I struck it.

"The scale box was at the same place, when I struck it, as it was when I first went to work for defendant."

The evidence was closed by the offer on behalf of the company of portions of a written application by plaintiff for employment as brakeman, dated February 22, 1900. After stating that the plaintiff identified the application, the bill of exceptions recites as follows:

"Defendant then offered in evidence the following portions of said application, consisting of questions and the answers thereto written by the plaintiff, for the purpose of showing that plaintiff had notice of the location of said track scale box, and that he was in danger of being knocked off of a car when passing the same:

"Q. 'Do you make this application for employment in train service, realizing the hazardous nature of such employment, understanding that it is necessary in operating this railway for the company to have overhead and truss bridges at certain points on the line; also coal chutes, track scale boxes, water tanks, coal houses, platforms, sheds, roofs, and other overhead and side structures, and that in performance of the duties for which you are employed you are liable to receive injuries by being knocked off the side or top of cars unless you use due care to avoid injury thereby?'

"A. 'Yes.'

"Q. 'Do you agree to acquaint yourself with the location of all overhead and truss bridges, as well as the location of all other structures along the line of the road?'

"A. 'Yes.'

"Q. 'Do you understand that no officer or employee of this company is authorized to request or require you to use defective tracks, cars, machinery, or appliances of any kind, and that when you do so you assume all risk of injury therefrom?'

"A. 'Yes.'

"Q. 'Do you understand that this company desires to employ only experienced men in the service, and does not undertake to educate inexperienced men?'

"A. 'Yes.'

"Counsel for plaintiff objected to the said testimony for the reason that it was irrelevant and immaterial, and that plaintiff had made this application and entered the employ of defendant, and afterwards resigned, and again entered the

Texas & Pac. Ry. Co. v. Swearingen

employ of the defendant some two years later, without making another application, and also because it was an effort on the part of defendant to limit its liability for its own negligence, and void, as against public policy, and because the particular location of this track scale box is not given; and the court having sustained plaintiff's objections, and excluded said testimony, the defendant then and there excepted to the action of the court in excluding said evidence, and tenders this, its bill of exceptions, which is allowed, signed, and sealed by the court."

The first assignment of error assails the affirmance by the court of appeals of the action of the trial court in refusing to receive in evidence the matter just referred to.

These excerpts were offered in evidence, as stated in the bill of exceptions, "for the purpose of showing that plaintiff had notice of the location of said track scale box, and that he was in danger of being knocked off a car when passing the same."

The application was made in February, 1900, and was for employment, not as switchman, but as brakeman. The employment of the plaintiff with the defendant company following the application was in December, 1901, when the plaintiff, as a brakeman, made about a dozen trips between El Paso and a place called Toyah. His subsequent employment as switchman commenced but a short time before the happening, in February, 1902, of the accident complained of.

We think the trial court rightly excluded the offered evidence. In the first place, the plaintiff had testified that before the accident he had knowledge of the existence of the scale box. In the next place, while undoubtedly the statements in the application tended to show that the plaintiff was aware of the generally hazardous nature of the employment, and the necessity of the exercise of care in working with and about the instrumentalities employed by the company in the operation of its railroad, the recognition of these facts by the plaintiff, and his agreement to acquaint himself with the location of bridges and other structures on the line of the road, did not tend to establish notice, communicated to the plaintiff, that the defendant company had not exercised due care in placing scales or scale boxes on its tracks, or that the company had, by its negligence, increased the ordinary hazards to be expected from the use of such structures, and that, by the exercise of ordinary care on his part, plaintiff could not escape injury. The evidence was therefore immaterial in the light of the issue upon which the jury had to pass.

At the close of all the evidence the defendant company requested the court to charge the jury to return a verdict for the defendant, and to the overruling of such motion the defendant company duly excepted. The second assignment alleges error in the affirmance by the court of appeals of the action of the trial court denying this motion.

The right to have the jury instructed to find for the company was based upon the following contention:

"a. Because the undisputed evidence established that said track scale box was erected in the defendant's yard, and, under the circumstances, in a reasonably safe place, and at a reasonably safe distance and location from track No. 2, on which track plaintiff was riding at the time he was injured.

"b. Because plaintiff testified he knew of the location of the track scale box and the location of track No. 2 with reference to said track scale box, on which track No. 2 he was riding at the time he was hurt, and because the undisputed evidence shows that the track scale box and the danger of the same was open and obvious to the view of plaintiff, and that neither the track scale box nor the dangers thereof were hidden or latent, and plaintiff was presumed to know the danger, and assumed the risks thereof.

"c. Because the uncontroverted testimony established the fact that plaintiff knew of the location of the track scale box, and location of said track No. 2 with reference to said track scale box, on which track he was riding at the time he was hurt, and that the track scale box and the dangers of the same were open and obvious to the view of plaintiff, and not hidden or latent, and plaintiff was presumed to know the danger, and assumed the risk."

The motion was properly overruled. So far from it being the fact, as asserted, that the evidence established indisputably the existence of the grounds upon which the motion was based, the record shows that there was evidence tending to establish that the track scale box was not erected in a reasonably safe place, and that, although the plaintiff knew that the scale box was situated adjacent to track No. 2, he did not know that it was so near that it could not be passed, in the performance of his duties as a switchman, without danger. This is apparent when it is borne in mind that the plaintiff testified, in substance, that prior to the accident he had not closely inspected the scale box or taken measurements of the distance from the box to the north rail of track No. 2, and that he did not do more than cursorily observe the structure from a distance, and that he was unaware of the nearness of the scale box to the north rail of track No. 2.

Prima facie, the location of scales where the tracks were only the standard distance apart, and where a space of less than 2 feet was left for the movements of a switchman between the side of a freight car and the scale box, encumbered, as he would be in the nighttime, with a lantern employed for the purpose of signaling, did not incontestably establish the performance by the defendant company of the duty imposed upon it to use due care to provide a reasonably safe place for the use of the switchmen in its employ. And so far from the proof making it certain that the necessity of the situation

Texas & Pac. Ry. Co. v. Swearingen

required the erection of the structure between tracks Nos. 1 and 2 as existing, there was proof that the railway company owned unoccupied ground, intended for other tracks, to the south of track No. 4, justifying the inference that the distance between tracks Nos. 1 and 2 might have been increased, and the employment of the scales thus rendered less hazardous to switchmen, or that the scales might have been removed to a safer location.

It was, therefore, properly a question for the determination of the jury whether or not the scales were maintained in a reasonably safe place, and if not, whether the plaintiff had notice thereof. The court of appeals was of opinion, and rightly we think, that the dangerous contiguity of the scale box to track No. 2, and the extra hazard to switchmen resulting therefrom, was not so open and obvious on other than a close inspection, as to justify taking from the jury the determination of the question whether there had been an assumption of the risk. The plaintiff was entitled to assume that the defendant company had used due care to provide a reasonably safe place for the doing by him of the work for which he had been employed, and as the fact that the defendant company might not have performed such duty in respect to the scale box in question was not so patent as to be readily observable, the court could not declare, in view of the testimony of the plaintiff as to his actual want of knowledge of the danger, that he had assumed the hazard incident to the actual situation. *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 68, 48 L. Ed. 96, 100, 24 Sup. Ct. Rep. 24.

The remaining assignment of error questions the correctness of the following portion of the charge to the jury:

"The defendant claims that the plaintiff knew of the existence and location of the scale box with which he came in contact, and that, by continuing in the work, with such knowledge, he assumed all risks incident to and arising out of his employment. Upon this point you are instructed that, if you believe from the testimony that prior to the plaintiff's injuries he knew of the existence and location of the scale box, and of the danger incident to the discharge of his duties while passing the same on a moving train, if danger there was; or if, knowing of the location of the structure, the danger to the employees while in the usual discharge of their duties was apparent, that is, open to observation,—then you are instructed that the plaintiff, by continuing in the employment of the defendant without complaint, assumed such risks, and he would not, therefore, be entitled to recover. In this connection you are further instructed that the mere fact that the plaintiff knew of the existence and location of the scale box would not, as a matter of law, charge him with knowledge of the danger, if such danger there was, due to its proximity to the north rail of track No. 2, and whether he knew of the danger is a question of fact for you to determine

Conine v. Olympia Logging Co

from a consideration of all the facts and circumstances in evidence.”

The grounds of the objection to the charge being thus stated:

“Because the proof showed that plaintiff knew of the location of the track scale box, and of track No. 2, on which he was riding at the time he was hurt, in reference to a scale box, and that the same and the location thereof was open and obvious to plaintiff's view, and, being an experienced brakeman, he was charged with notice that riding on the cars as he did was dangerous, and he assumed the risks thereof, and the court should have so charged the jury.”

This assignment but reiterates contentions made in connection with the assignment based on the alleged error in overruling the motion for judgment. As we have already decided that knowledge of the increased hazard resulting from the dangerous proximity of the scale box to the north rail of track No. 2 could not be imputed to the plaintiff simply because he was aware of the existence and general location of the scale box, it was for the jury to determine, from a consideration of all the facts and circumstances in evidence, whether plaintiff had actual knowledge of the danger.

We find no error in the judgment of the Circuit Court of Appeals, and it is affirmed.

CONINE *v.* OLYMPIA LOGGING CO.

(Supreme Court of Washington, Dec. 22, 1904.)

[78 Pac. Rep. 932.]

Injury to Employee—Concurring Negligence of Master and Fellow Servant.*

Plaintiff was engaged in attaching to a cable logs which were being dragged to defendant's logging camp by an engine. There was a signal wire or rope from the engine to the place where plaintiff was working to advise the engineer to start the engine. Plaintiff was working 60 rods from the engine, and was not visible therefrom, but there was no signal provided for the engineer to advise the plaintiff that the engine would start. Plaintiff was injured by the negligence of the engineer in starting the engine without signal from the plaintiff, but his injuries could have been avoided by the defendant providing a signal for use by the engineer: *held*, that the negligence of the engineer and that of the defendant concurred to produce the plaintiff's injuries, and hence defendant was liable therefor.

Fellow Servants—Different Department Limitation—Engineer, and Employee Adjusting Chain to Logs to be Dragged by Engine.†

The plaintiff and the engineer were so remote from each other that they had no connective influence by which one fellow servant is required to guard himself against the neglect of another, and hence the fellow-servant rule would not prevent defendant's liability attaching for the injuries to plaintiff.

*See foot-note appended to *Illinois So. Ry. Co. v. Marshall* (Ill.), 13 R. R. R. 95, 36 Am. & Eng. R. Cas., N. S., 95; *Hicks v. Southern Pac. Co.* (Utah.), 12 R. R. R. 332, 35 Am. & Eng. R. Cas., N. S., 332.

†See foot-note appended to *Indianapolis, & G. R. T. Co. v. Foreman* (Ind.), 11 R. R. R. 214, 34 Am. & Eng. R. Cas., N. S., 214.

Conine v. Olympia Logging Co

Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

Action by Cloyce D. Conine against the Olympia Logging Company. From a judgment for defendant, plaintiff appeals. Reversed.

Phil. Skillman and J. W. Robinson, for appellant.
Israel & Mackay, for respondent.

HADLEY, J. Appellant brought this action to recover damages for injuries received while he was working in respondent's logging camp. The complaint avers that in the prosecution of its business the respondent used modern logging appliances, in the way of machinery and cables to drag the logs from the places where they were cut in the woods to the places where they were loaded on the cars for transportation to the market; that a donkey engine was used for dragging the logs upon the ground, and that by means of a cable the engine was connected with the logs some distance from it; that a signal wire or rope was strung from the engine to the place where the cable was fastened to the logs, so that respondent's employees in charge of the work of attaching the cable to the logs could give a signal to the engineer at the engine, thus notifying him that all was in readiness for the engine to start and drag the logs; and that such a signal wire or rope was used at the time the appellant's injuries were received, and that it furnished the only means of signaling from the location of the logs in the woods to the engineer at the engine; that, under the rule established by respondent company, the engineer was required to await the signal before starting the engine and moving the logs; that appellant was engaged in attaching the cable to logs, and before he had finished the work of attaching it to certain logs, before he was ready to give or did give any signal, and without any warning whatever to appellant, the engineer started the engine, and appellant was thereby injured. It is further averred that the place where appellant was injured was 60 rods distant from the location of the engine, and could not be seen from the place of the engine; that the aforesaid signal wire or rope was the only means provided for communication between the two points; that the respondent negligently failed to provide any means by which the engineer could signal the appellant that he was about to start the engine, so that appellant could protect himself from injury. Respondent demurred generally to the complaint, and the demurrer was sustained. Appellant stood upon the complaint, refusing to plead further, and judgment was thereupon entered dismissing the action. The plaintiff has appealed.

Respondent urges that the complaint discloses no negligence on its part, and that any negligence which appears is clearly that of a fellow servant. Negligence of the

Conine v. Olympia Logging Co

engineer is alleged, and, while appellant asserts in his brief that respondent was negligent in having employed an incompetent engineer, yet he neither alleged in the complaint that the engineer was in fact incompetent, nor that the respondent continued him in its employ when it knew or should have known that he was incompetent. The complaint therefore tenders no issue as to the incompetence of the engineer.

It is also averred that the appliances which were used by respondent were modern, and that allegation, standing alone, would seem to negative the idea that there was any negligence in furnishing proper appliances. The additional allegation, however, that respondent negligently failed to provide any appliance by which the engineer could signal the man at the logs, materially modifies the former one. What is, at least by the pleader, called "negligence," is thus directly charged to respondent. It remains to be determined whether the fact characterized in the pleading as being negligence should be held, as a matter of law, not to be such. This necessarily calls for an analysis of the relative situation of the persons concerned. The respondent was the employer of both the engineer and appellant, and each was at the post assigned to him by his employer. They were distant from each other 60 rods. Intervening things obstructed the view from one to the other. This method of prosecuting the business has been adopted and directed by respondent. To meet the emergencies of this peculiar situation, respondent had provided means for signals from the location of the logs to the engineer; but, from the complaint, it appears that no contrivance was supplied by which the engineer could signal the men at the logs. As against demurrer, at least, the complaint seems sufficiently to charge that an available appliance could have been as successfully supplied for one purpose as for the other. The charge is that the engine was started without any signal or warning to appellant, and that by reason thereof he was injured. He was certainly without fault, under the circumstances detailed in the complaint. He could not see the engine or the engineer. His work necessarily placed him in contact with the dangerous surroundings, and it was the duty of respondent to furnish as reasonably safe contrivances to guard him against danger as the circumstances and nature of the business in hand would permit. If appellant had been warned that the engine was about to start, it must be assumed here that he would have escaped injury. His injuries were caused by the starting of the engine. The engineer being provided with no means to give warning that he was about to start the engine, then, whether the start was rightfully or wrongfully made on his part, or whether it was done under some misapprehension or misunderstanding, the fact remains that, if signaling means had been provided, he could have signaled

appellant that the engine was about to start, and thus have given him notice to remove himself from the place of danger. While the complaint charges negligence of the engineer, yet it does not charge that his negligence was the sole proximate cause of the accident. The effect of all the allegations, taken together, is to charge that the negligence of the engineer was a concurring cause with negligence of the respondent. In *Costa v. Pacific Coast Company*, 26 Wash. 138, 66 Pac. 398, this court said: "In other words, it is not clear that Castrania, if negligent as a matter of law, was the sole, direct, proximate cause of the accident; but his acts may be viewed, rather, as a concurring cause with the negligence of appellant. The rule seems to be that the negligence of a fellow servant does not excuse the master from liability to a co-servant for an injury which would not have happened, had the master performed his duty." See, also, *Brabon v. Seattle*, 29 Wash. 6, 69 Pac. 365. Moreover, the situation outlined in the complaint may be said to come within the rule declared in *Cooper v. Mullins*, 30 Ga. 146, 76 Am. Dec. 638. In that opinion, after stating the general rule to be that one injured by the negligence of a servant in his master's business is entitled to redress, it is said that the railroad company in the case claimed an exception to the rule as against other servants of the same master. The exception to the rule is conceded by the court, and, after stating the reason for it, the opinion continues: "This reason can have no application to employees whose situations allow them no connective influence over each other. * * * It follows, therefore, that the cases to which this exception applies are only those where the servant receiving the injury is engaged with the servant inflicting it in a common business, where he has an opportunity to exercise a preventive care over his negligence." The above case was cited approvingly upon this point in *Hammarberg v. St. Paul & Tacoma Lumber Co.*, 19 Wash. 537, 53 Pac. 727; *Bateman v. Peninsular Ry. Co.*, 20 Wash. 133, 54 Pac. 996; *Uren v. Golden Tunnel Mining Co.*, 24 Wash. 261, 64 Pac. 174. We think the doctrine of the cited Georgia case, repeatedly approved by this court, applies to the case stated in the complaint now before us. The situation alleged, as we have seen, was such that appellant could not see the engineer, and had not an opportunity to exercise any preventive influence over him, or to guard himself against the act of starting the engine at the time it was done. They were neither in sight nor within reasonable hearing distance of each other. While the work of each was directed to a common end, yet they were so remote from each other that they had no opportunity for the connective influence by which one fellow servant is required to guard himself against the neglect of another, and it appears that sufficient means for so doing had not been supplied by respondent.

Central of Georgia Ry. Co. v. Morris

For the foregoing reasons, we believe the complaint is sufficient as against demurrer, and that it states a cause of action. The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer.

DUNBAR, ANDERS, and MOUNT, JJ., concur.

CENTRAL OF GEORGIA RY. CO. v. MORRIS.

(Supreme Court of Georgia, Dec. 20, 1904.)

[49 S. E. Rep. 606.]

Master and Servant—Assault by Servant.*

A railroad company is not liable in damages for an assault and battery committed upon an intruder on its premises by an agent or employee who at the time was acting, not within the scope of his employment, but wholly outside of the general authority with which he had been clothed by the company.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by T. C. Morris against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. Branham and McHenry & Maddox, for plaintiff in error.
Seaborn & Barry Wright, for defendant in error.

EVANS, J. The error assigned in the bill of exceptions sued out in this case is that the court below overruled a demurrer to the plaintiff's petition as amended at the trial. The allegations of fact upon which the plaintiff sought to recover were substantially as follows: On October 5, 1902, plaintiff went onto the platform of defendant's freight depot, at the request and invitation of a policeman of the city of Rome, for the purpose of pointing out to the policeman a man in the company's employ whom the policeman desired to arrest for a violation of an ordinance of that city. While standing on the platform, the plaintiff was approached by one J. C. O'Dell, "an employee of defendant in the capacity of trainmaster," who said to him, "I told you not to come around here again, bothering my men," or words of similar import; meaning that he had told plaintiff not to bother the employees of the defendant who were under his direction and control, and implying that plaintiff was at the time bothering an employee who was under his control and direction. After so addressing plaintiff, O'Dell violently assaulted him and threw him off the platform into the street, a distance of four feet, in the presence of many bystanders, and in a place

*See foot-note appended to *Letts v. Hoboken R., W. & S. Con. Co.* (N. J.), 11 R. R. R. 139, 34 Am. Eng. R. Cas., N. S., 139.

Central of Georgia Ry. Co. v. Morris

fully exposed to view by the public, and O'Dell at the same time cursed and abused plaintiff. The said "J. C. O'Dell was an employee of defendant in capacity of trainmaster, as aforesaid, whose duty was to exercise a general supervision over all trainmen and operators, and to report all neglect of duty on the part of employees." The assault upon plaintiff was made because he had come there for the purpose of pointing out to the policeman an employee and trainman who was under the control of O'Dell, and "said O'Dell was acting in his capacity as trainmaster, as aforesaid, and not in his individual capacity." The plaintiff was greatly embarrassed and humiliated by the unlawful and violent battery committed upon him, and his feelings were thereby wounded, and he asks for \$2,000 damages.

It is unnecessary to set forth the special grounds of the defendant's demurrer, for, in the view we take of the case, the general demurrer to the plaintiff's petition should have been sustained.

The plaintiff did not go upon the premises of the company at its invitation, express or implied, but upon the invitation of a policeman. There is no pretense that the plaintiff had any business to transact with the company. In this respect the case differs very materially from those of *Christian v. Ry. Co.*, 79 Ga. 460, 7 S. E. 216; *Columbus & R. Ry. Co. v. Christian*, 97 Ga. 56, 25 S. E. 411; and *Ga. R. Co. v. Richmond*, 98 Ga. 495, 25 S. E. 565. Accordingly the company owed to the plaintiff no affirmative duty of protection against an unprovoked assault by one of its employees, and cannot be held liable in damages for a battery committed by an agent or employee who acted outside of the scope of his authority and upon his individual responsibility. *Ga. R. Co. v. Wood*, 94 Ga. 124, 21 S. E. 288, 47 Am. St. Rep. 146; *Lynch v. R. Co.*, 113 Ga. 1105, 39 S. E. 411, 54 L. R. A. 810. The plaintiff was a mere intruder, and the company had a right to insist upon his departure. If he persisted in remaining, the company could lawfully use such force as was reasonably necessary to eject him from its premises. *Hammond v. Hightower*, 82 Ga. 290, 9 S. E. 1101. This right could be exercised by any agent to whom the company had delegated the power to exercise it; the company being responsible, of course, for any abuse of such power by its agent. But it does not appear that O'Dell, the employee who assaulted the plaintiff, was an agent to whom the company had delegated its right to eject intruders from its premises. We are informed by the plaintiff's petition that O'Dell was assuming to act, not in his individual capacity, but in his capacity as trainmaster. His official designation does not warrant the inference that he was placed by the company in charge of its premises, and had either express or implied power to determine who were intruders, and to protect the company's interests by ejecting persons whom he believed

Vrooman v. North Jersey St. Ry. Co

came there for the purpose of bothering the employees placed under his control and direction. Therefore that he assumed to act in his official capacity, rather than as an individual, cannot be regarded as sufficient to render the company liable for his actions. The important thing to be considered, and that upon which the right of the plaintiff to recover depends, is whether or not O'Dell acted within the scope of the business for the transaction of which he was employed. As to this all-important matter, the plaintiff simply alleges that the trainmaster's "duty was to exercise a general supervision over all trainmen and operators, and to report all neglect of duty on the part of employees." There is in the petition no hint that O'Dell was held out by the company as an agent authorized to deal in its behalf with the general public in any manner whatsoever, or to perform for it any service save that of exercising a general supervision over a particular branch of its internal affairs. The company had a right to thus limit the field of his usefulness. It was not bound to appoint him its "casual ejector." That it ever, in point of fact, clothed him with authority to take any action with respect to persons coming upon its premises, at or without its invitation, does not appear. The plaintiff's petition is lacking in one of the essential ingredients necessary to a cause of action against the defendant company for the tort complained of, and should have been dismissed on general demurrer.

Judgment reversed. All the Justices concur.

VROOMAN v. NORTH JERSEY ST. RY. CO.

(Court of Errors and Appeals of New Jersey, Nov. 15, 1904.)

[59 Atl. Rep. 459.]

Collision between Street Car and Another Vehicle—Contributory Negligence—Right to Assume That Car Will Not Continue to Run at Excessive Speed*

The driver of a truck is not guilty of negligence, as a matter of law, in attempting to cross a street railway track in front of a trolley car 550 feet away, which is approaching him at a very great rate of speed. He has the right to assume that the car is furnished with appliances to reduce speed and to stop, and with a motorman to make use of such appliances, and that the car will not continue to run in violation of the law limiting the speed of vehicles in public streets to that which is compatible with a safe use thereof by other vehicles.

Directing Verdict.

In an action for damages resulting from an injury caused by negli-

*See generally, foot-note appended to *Louisville Ry. Co. v. Colston* (Ky.), 12 R. R. R. 668, 35 Am. & Eng. R. Cas., N. S., 668; foot-note appended to *Anniston Electric & Gas Co. v. Hewitt* (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas., N. S., 312.

As to the duty to stop, look, and listen before crossing street railways, see foot-note appended to *Itzkowitz v. Boston Elevated Ry. Co.* (Mass.), 12 R. R. R. 583, 35 Am. & Eng. R. Cas., N. S., 583.

Vrooman v. North Jersey St. Ry. Co

gence, it is the duty of the trial judge, when requested to nonsuit or direct a verdict, to determine whether any facts have been established by evidence from which negligence may be reasonably inferred. If the real facts have not been established by the evidence, he must submit them to the jury.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Katharine Vrooman against the North Jersey Street Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

James B. Vredenburg, for plaintiff in error.

Walter L. McDermott, for defendant in error.

VROOM, J. This case, together with those of George J. Lecher and Samuel B. Lowrey against the same defendant, were tried together at the Hudson circuit; all having arisen out of the same accident. The action of Katharine Vrooman, administratrix, etc., was brought to recover damages for the death of her husband, Henry Vrooman, caused by injuries received in a collision between a truck driven by him and a trolley car of the North Jersey Street Railway Company; that of George J. Lecher, the owner of the horses and truck hired by Vrooman, for the killing of one horse, the injury to the other, and the damages to the truck; that of Samuel B. Lowrey, a helper of Vrooman, for injuries received. The accident occurred on the 13th day of June, 1902. Vrooman and his helper, Lowrey, had in this truck taken to Newark from New York a load of watermelons. In the afternoon they were returning to Jersey City along Communipaw avenue. On this avenue there is a double-track trolley road of the defendant company. About half past 4, when nearly opposite a roadhouse called "Glendale Park," where drivers frequently stop to water their horses, Vrooman started to cross the avenue diagonally to go to the hotel. He had been driving on the southerly side of the street; some of the witnesses saying that the truck and horses were on that side, and others that they were partly on the east-bound track (which is on the south side) and partly in the roadway. According to the testimony, a trolley was approaching on the west-bound track in the direction of Newark. Lowrey, who was in the truck with the deceased, said that, when he first saw the car coming at the point where they were about to cross to go to Glendale Park, it was 600 feet away; that after the horses had been turned in a slanting direction toward the hotel, and had gotten in the middle of the track, the car was about 250 feet away, and coming at so great a speed that, seeing his danger, Vrooman started to back off the track, and turned the horses; the car was then 75 feet away, and before he could get off the track they were struck. Regarding the rate of speed of the car, he testified that it could not go any

Vrooman v. North Jersey St. Ry. Co

faster. In fact, there was little or no dispute that the car was going at a very high rate of speed. There was a decided difference in the testimony as to the distance between the car and the truck when the driver first started to cross; varying from 600 and 550 feet on the part of the plaintiff to 30, 40, and 50 feet on the part of the defendant. After striking the horses, the car went on, according to some witnesses, about a block and a half past the point of collision; according to others, 150 feet; the motorman testifying, however, that he brought it to a stop in 25 or 30 feet. At the close of the plaintiff's case a motion to nonsuit was denied, as was also a direction for a verdict for the defendant at the close of the case. The verdict was for the plaintiff.

The two assignments of error relied upon by the plaintiff in error were the refusal to nonsuit, and the refusal of the trial judge to direct a verdict for the defendant.

I think the refusal to nonsuit was entirely justified. The contention on behalf of the defendant below is that the plaintiff's intestate was guilty of contributory negligence, in that the truck driven by him returned suddenly diagonally across, in front of and towards a rapidly approaching car. Manifestly, in the state of the evidence at the close of the plaintiff's case, a nonsuit could not be granted. It must be conceded that the rights of the truck and the car on this public street were equal, with the exception that, because the cars could not deviate from the track, other vehicles must give way to them when there is occasion for them to pass. But neither the driver of the truck nor the company could drive their respective vehicles at a rate of speed incompatible with the safe and customary use of the street by other vehicles and foot passengers. *Consolidated Traction Co. v. Lambertson*, 59 N. J. Law, 297, 36 Atl. 100. If, as appeared from the evidence, the driver of the truck commenced to turn across the track when the car was 550 feet away, he had, under the decision in *Consolidated Traction Co. v. Lambertson*, *supra*, the right to assume that the approaching car was furnished with appliances to reduce speed and to stop, and with a motorman to make use of such appliances, even though it was coming at a great rate of speed; and it certainly would not, under those circumstances, have been within the province of the trial judge to take from the jury the question of whether the motorman was guilty of negligence in thus operating his car on this street, and clearly it was not his duty to say that the driver of the truck was guilty of negligence which contributed to the accident.

There is no basis for the contention of the plaintiff in error that the evidence made out such a clear case of contributory negligence that no reasonable person can differ about it, and that for that reason the case should have been taken from the jury. As said by Lippincott, J., in *Consolidated Traction Co. v. Reeves*, 58 N. J. Law, 576, 34 Atl. 129: "If, from

the facts in evidence, two inferences or conclusions can be reasonably deduced—one favorable to the plaintiff, and the other against him—a question then is presented which conclusively calls for the opinion of the jury. This principle is alike applicable whether negligence, as approximate and sole cause of the injury, has been established against the defendant, or not." Citing *Pennsylvania R. Co. v. Matthews*, 36 N. J. Law, 531; *Bahr v. Lombard, Ayres & Co.*, 53 N. J. Law, 233, 21 Atl. 190, 23 Atl. 167; and other cases.

It remains next to be considered whether at the close of the case the evidence of the defendant was of such a character as to require the trial judge, on the whole case, as requested by defendant, to direct a verdict in its favor. In the case of *Newark Passenger R. Co. v. Block*, 55 N. J. Law, 605, 27 Atl. 1067, 22 L. R. A. 374, in this court, Magie, J., quotes approvingly from the opinion of Lord Chancellor Cairns in *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 193, that the duty of the trial judge, when requested to nonsuit or direct a verdict, is to say whether any facts have been established by evidence from which negligence may be reasonably inferred. If none, there is no case to go to the jury; but if, from the facts established, negligence may be reasonably and legitimately inferred, it is for the jury to say whether from these facts negligence ought to be inferred. And he then adds (page 607, 55 N. J. Law, page 1068, 27 Atl., 22 L. R. A. 374): "In performing this function the trial judge must take care not to trench on the peculiar province of the jury to determine questions of fact, and must bear in mind that the question is not whether he would infer negligence from the established facts, but whether negligence can be reasonably and legitimately inferred therefrom by the jury. It follows that if the real facts have not been established by the evidence, but remain in substantial dispute, the trial judge must submit them, and the inferences to be drawn from those which the jury find established, to the determination of the jury." For the trial judge to have said, when this request to direct a verdict for the defendant was made, that the facts of the case had been established, would have been an impossibility. In no way could the evidence be reconciled; that of the defendant being of such a character as to flatly contradict the case made by the plaintiff, so that the real facts could only be determined by the jury.

The other assignments of error were not pressed by the plaintiff in error, but I am satisfied, after examination, that there was no error in the charge in the respects referred to in said assignments.

No error being found, the judgment below should be affirmed.

TOLEDO, ST. L. & W. R. CO. *v.* PARKS.

(Supreme Court of Indiana, Dec. 7, 1904.)

[72 N. E. Rep. 636.]

Bill of Exceptions.

Where a bill of exceptions was signed and filed on the same day, it will be presumed that the signature of the judge preceded the filing.

Fires Set by Locomotives—Circumstantial Evidence—Sufficiency.*

Evidence that within a few minutes after a freight train passed over defendant's railroad a fire broke out in plaintiff's woods at a point about 10 feet from the right of way, and that prior to the passage of the train there was no fire in the woods, and, aside from the locomotive, there was no known actual or probable source of the fire, was sufficient to justify a finding that the fire was caused by the engine.

Same—Negligence—Insufficiency of Evidence.

In an action against a railroad company for damages from fire set by defendant's engine, there was no evidence that the fire originated from coals or sparks from the fire box or ash pan, and the jury found that the fire was started by a spark emitted from the smokestack of the engine. The engine was shown to have been equipped with one of the best and most approved spark arresters, and was being operated in a careful manner, by competent employees; and there was uncontradicted testimony of a witness who personally inspected the spark arrester of the engine after the fire that it was in good condition: *held*, that there was no evidence of negligence sufficient to sustain a recovery.

Appeal from Superior Court, Grant County; B. F. Harness, Judge.

Action by Henry N. Parks against the Toledo, St. Louis & Western Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Transferred from Appellate Court under section 1337u, Burns' Ann. St. 1901. Reversed.

Guenther & Clark, for appellant.

John A. Kersey, for appellee.

HADLEY, J. Appellee recovered judgment for damages caused by fire alleged to have been permitted to escape from a locomotive through the negligence of appellant. The negligence charged in the complaint was the use on the locomotive of an insufficient spark arrester, and an insufficient furnace, fire box, and ash pan, by reason whereof fire was thrown out and away from the engine onto the plaintiff's timber land adjoining the defendant's right of way, ignited the grass, and destroyed his growing trees. The answer was a general denial. The overruling of the motion for a new trial is the decision challenged. The grounds of this motion are the insufficiency of the evidence, the admission of improper evidence, and the giving and the refusing of certain instructions.

Is the evidence sufficient to sustain the verdict? Appellee

*As to whether the origin of a fire alleged to have been set by a locomotive may be established by circumstantial evidence, see foot-notes appended to *Kansas City, etc., R. Co. v. Blaker & Co.* (Kan.), 10 R. R. 53, 33 Am. & Eng. R. Cas., N. S., 53.

makes the point that the evidence is not in the record, because the bill of exceptions purporting to contain it is not shown to have been filed after it was signed by the judge. An inspection of the record reveals that the signing and filing of the bill occurred upon the same day, and, under the repeated rulings of this court, in such cases we will presume, in favor of the proper action of the judge, that he subscribed his signature to the bill before it was filed. *Martin v. State*, 148 Ind. 519, 47 N. E. 930; *Minnick v. State*, 154 Ind. 379, 382, 56 N. E. 851; *Bradley, etc., Co. v. Whicker*, 23 Ind. App. 380, 381, 55 N. E. 490.

The plaintiff introduced evidence to the effect that he owns a farm of 100 acres, a portion of which, known as "the woods," was situate north of and adjoining appellant's right of way. The railroad at this point is almost level, and runs east and west. On April 22, 1903, between 11:30 and 12 o'clock a. m., in a dry time, and within a few minutes after a freight train on appellant's road went west, a fire broke out in appellee's woods at a point about 10 feet from the right of way. At the time there was a brisk wind blowing from the southwest towards the northeast. The fire spread rapidly, and, before it could be controlled, destroyed growing trees to the damage of the plaintiff of \$250. Before the passage of the freight train there was no fire in the plaintiff's woods, and, aside from the locomotive that hauled the train, there was no known actual or probable source of the fire. On the other hand, the defendant produced evidence that engine 64 pulled the freight train that passed the point where the fire occurred about 11:54 a. m., and no other engine or train passed the place within one hour of the time of the fire; that engine 64 was equipped with a spark-arresting device that was in common use on railroads, and was generally regarded as one of the best and most approved devices for preventing the escape of fire. On the evening after the fire, upon the return of engine 64 to the roundhouse, it was inspected by a competent inspector, who examined the spark arrester, fire box, and ash pan, and made as the inspection progressed, and as he does in all inspections, a record of the condition of each part, and the spark arrester, fire box, and ash pan were at that time in good condition. The mesh of the netting used in the spark arrester on engine 64 was the same size used in all first-class arresters, and is as small as can be used without impairing the draft and steaming power of the locomotives. Some fire will find its way through the netting under the most favorable conditions, and, once through, will escape from the smokestack to the open air, and be subjected to the control of the elements; and how far it will be carried depends upon the velocity of the wind and state of the atmosphere.

To entitle him to recover, the law requires the appellee to establish two things by a preponderance of the evidence: First, that the fire which destroyed his trees escaped from

Toledo, etc., R. Co. v. Parks

appellant's locomotive; and, second, that the escape was caused by the negligence of appellant. Appellee, well understanding what the law required of him in this respect, made the necessary averments in his complaint. Has he established both propositions by competent and sufficient evidence? We assume, without deciding, that there were enough circumstances established to warrant the conclusion that the fire did escape from appellant's engine, but we are unable to find of a syllable of testimony, or a single circumstance shown by the evidence, that will sustain a legal inference in support of the negligence charged. The law recognizes the right of a railroad company to carry fire on its locomotives for the production of steam. It holds the company to a degree of care proportionate to the danger to prevent its escape, but, when the company uses and maintains in good repair devices which are generally used and approved as the best and most efficient means for the suppression of fire, it has done all the law requires; and, if fire escapes notwithstanding such precaution, the escape is not accounted negligence in the company. *Railroad Co. v. Fenstermaker* (this term; No. 20,413) 72 N. E. 561. A railroad company, like an individual engaged in a lawful pursuit, is presumed to obey the law in the running of its trains. If, therefore, fire escapes from its locomotives, the escape is presumed to have occurred without the fault of the company, and whoever charges the contrary must prove it by a preponderance of the evidence. *Railroad Co. v. Ostrander*, 116 Ind. 259, 263, 15 N. E. 227, 19 N. E. 110. There is no evidence whatever that the fire originated from the escape of coals or sparks from the fire box or ash pan, and from the purpose of argument, merely, and as indicating the basis upon which the verdict rests, the jury found in answer to interrogatories propounded to it by the court that the fire was started by a spark emitted from the smokestack of appellant's engine, which engine at the time was equipped with one of the best and most approved appliances in use for arresting sparks and preventing the escape of fire, and was being operated in a careful manner and by competent employees, but the spark arrester was not at the time in good repair. What evidence can appellee point to that tends to prove that the spark arrester was out of repair? No witness testified that it was in bad condition, or to seeing more sparks issue from the smokestack of the locomotive than are usual to engines skillfully equipped with the best and most approved appliances. Such finding is not only not sustained by any evidence, but is contrary to the uncontradicted testimony of a witness who personally inspected the spark arrester the evening after the fire, upon the return of the engine to the roundhouse. A verdict in favor of a party having the burden of proof cannot be arrived at by a mere guess or conjecture, but must be grounded upon some substantial legal evidence.

McKernan v. Detroit Citizens' St. Ry. Co

From the evidence adduced, we have an uncontroverted case where the locomotive claimed to have communicated the fire was equipped with the most approved and best known spark arrester, in good condition, and carefully operated by competent employees. If fire escaped from such an engine, as we have seen, it must be accounted an accident for which appellant is not liable.

The court erred in refusing appellant a new trial.

There are other questions presented, which we deem unprofitable to decide, as they are not likely to arise upon a new trial.

Judgment reversed, and cause remanded, with instructions to grant appellant a new trial.

McKERNAN v. DETROIT CITIZENS' ST. RY. CO.

(Supreme Court of Michigan, Dec. 22, 1904.)

[101 N. W. Rep. 812.]

Appeal—Review—Pleading.

In an action by a fireman against a street railway company to recover for injuries from collision with a street car passing an engine house as plaintiff emerged therefrom, riding on the rear of a fire engine, the declaration did not cover negligence of the defendant before discovering the plaintiff's exit from the engine house. There was judgment for defendant, and on appeal it insisted that the verdict of the jury settled that there was no negligence after the discovery of plaintiff's exit, and that therefore the questions raised by appellant as to imputed negligence, etc., were immaterial: *held*, that, as the evidence covering plaintiff's whole case was received without objection as to the pleadings, the court on appeal could not assume that an amendment would have been refused, and would consider the whole case.

Injury to Fireman—Collision between Street Car and Fire Engine—Speed—Application of Company's Rule.

In an action by a fireman against a street railway company for personal injuries from a collision of a street car with a fire engine on which plaintiff was riding as it emerged from an engine house, a rule of the railway company requiring that cars, when passing engine houses, must not go faster than four miles an hour, should not be construed as applying only to the space directly in front of an engine house, and to impose on the motorman no obligation to approach the engine house at a reduced rate.

Collision between Street Car and Fire Engine—Speed—Negligence—Violation of Company's Rule.

Violation of the rule was not negligence per se, but was evidence bearing on the question whether a faster rate was in accordance with careful management.

Same—Imputable Negligence.*

The negligence of the driver of a fire engine was not imputable to the engineer, who, in the performance of his duty, was riding on the rear end of the engine when it collided with a street car.

*For authorities in this series on the subject of imputed negligence, see foot-note appended to *Carney v. Concord St. Ry.* (N. H.), 11 R. R. R. 307, 34 Am. & Eng. R. Cas., N. S., 307; foot-note appended to *Duval v. Coast Line R. Co.* (N. Car.), 11 R. R. R. 235, 34 Am. & Eng. R. Cas. N. S., 235.

McKernan v. Detroit Citizens' St. Ry. Co

Error to Circuit Court, Wayne County; Morse Rohnert, Judge.

Action by John McKernan against the Detroit Citizens' Street Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Orla B. Taylor, for appellant.

Brennan, Donnelly & Van De Mark, for appellee.

MONTGOMERY, J. This is an action to recover for injuries sustained by the alleged negligence of the defendant. The case was submitted to the jury, resulting in a verdict for defendant. The testimony on the part of the plaintiff tended to show the following facts: At the time of the accident the defendant was operating a single-track railway upon Congress street. Electric cars were operated in an easterly direction over this track. Fire engine house No. 19 is located on the north side of Congress street, between Chene street, on the west, and Joseph Campau avenue, on the east. The distance from Chene street to Joseph Campau avenue is 881 feet. The engine house is 686 feet east of Chene street. The block being a very long one, there is a trolley station 271 feet west of the west lot line of the engine house. The engine-house lot is 55 feet in width, the building extending from the east line of the lot to within 13 feet of the west lot line. There are two 10-foot doorways, through which the engine and hose cart gain entrance to the street. These doors are separated by a space of 5 feet. Each doorway has two doors, which swing outward, and when opened can be seen from the corner of Chene street. At the time of the accident the hose cart came out of the west door, and the engine out of the east door. Congress street is 60 feet in width. The paved portion of the street is 30½ feet in width, the car track is 4 feet and 7 inches wide, and the distance from the track to the curb line is 12 feet and 10 inches. The engine house is 31 feet from the curb line, and there is a brick-paved runway, with a fall of a little over 2 feet, leading down to the street. The fire engine weighed 9,600 pounds. It was about 12 feet long from the front end of the suction pipes to the back end. The suction pipes stick out about 2 feet behind the rear wheels. Three horses were used to draw the engine. In order to handle it as it emerged from the engine house, it was necessary to take a course in a southwesterly direction to the southerly side of the car track, gradually turning to the west. The plaintiff at the time of the accident was the engineer of the fire engine. As such, it was his duty, when the engine left the house, to take his position at the rear end of the engine, between the suction pipes. He had nothing whatever to do with the management of the horses. The accident occurred on September 25, 1900, at about 11:30 in the forenoon. It was a warm, clear day. The car was proceed-

ing in an easterly direction at a speed which is variously estimated from 8 to 15 miles an hour. Just after the car passed the trolley station, the hose cart emerged from the west door of the engine house. Capt. Ortwine and the driver, Kemberling, were upon the seat of the hose cart. The bell was rung before starting and while leaving the engine house. The ringing continued until the hose cart was clear out into the street. Kemberling turned westerly and proceeded about 50 or 60 feet in the car track, when Ortwine called his attention to the fact that the approaching car had not stopped in the usual manner. He then turned to the left, out of the track, and the back end of the hose cart, as it swung out of the track, cleared the car by about 2 feet. The car was about 100 feet from the hose cart when Kemberling turned off the track. Thus the car passed the hose cart about 100 feet westerly of the engine house lot line, or about 113 feet from the house itself. Just as the hose cart passed the car, the engine came out of the house. Lieut. Murphy and Schneider, the driver, were seated upon the engine seat. Plaintiff was standing upon the rear of the engine, between the suction pipes. After clearing the doors of the house, Schneider drove in a southwesterly direction across the car track. The engine was nearly across the track, when the car struck the right hind wheel with great violence. The engine, weighing nearly 5 tons, was tipped over, the tire of the wheel, 2 inches wide and seven-eighths of an inch thick, was cut in two, and plaintiff was severely injured. The collision occurred practically on the line of intersection of the west lot line with the car track. The motorman was an experienced man, an was entirely familiar with the location of the engine house. He heard the alarm, and he saw the horses just as they were coming out of the house. He states that the track was slippery and wet. There was evidence, however, that it was a warm, clear day, and that the track was dry. Evidence of experts was given as to the distance within which a car could be stopped when going at various rates of speed. Witness Smith testified that a car going at the rate of 10 miles an hour could be stopped in 80 feet, and at 7 miles an hour in 50 feet, and at lesser rates in a correspondingly less distance. Witness Haire fixed the distance at 100 feet and 60 feet, at the rates of 10 and 7 miles, respectively. Cole, the motorman, says that his schedule time was 12 miles an hour, and that when the car was in proper shape he could make stops in a car length—about 30 feet. A rule of the company reads as follows: "Motormen, when passing schools at the time of commencement or the letting out of same, or when passing by engine houses, must not go faster than four miles an hour."

The circuit judge submitted to the jury the question of defendant's negligence, but held that the defendant's rule cut no figure in the case. The circuit judge also held that the

negligence of the driver of the fire engine should be imputed to the plaintiff, and that "the negligence of the fire people [evidently meaning the driver] in not looking and listening before they came out of the engine house relieved the company from liability for any negligence on the part of the motorman in violation of any rule which required him to keep his car in check in approaching the engine house, up to the moment when the motorman had knowledge that the apparatus was coming out of the house."

It was strenuously insisted on the argument in this court that the form of the plaintiff's declaration was such as to preclude a recovery based upon negligence of the motorman at any time before he had actual knowledge that the engine was coming out of the engine house, and that the jury must have found, under the court's instruction, that there was no negligence on the part of the motorman after discovering the fire engine, and that therefore the questions discussed by appellant became immaterial. It is not altogether clear that the jury would understand from the charge that the question of the motorman's negligence was the only one left for consideration; but, however this may be, the record shows that the plaintiff's whole case was covered by the testimony, and it does not appear that any question was made as to the sufficiency of the pleading to cover the case made. We cannot assume that, had such a point been made, the circuit judge would have refused an amendment. See *Ross v. Township of Ionia*, 104 Mich. 320, 62 N. W. 401; *Findlay v. C. & G. T. R. R.*, 106 Mich. 700, 64 N. W. 732; *Garon v. Lockard*, 108 Mich. 196, 65 N. W. 764; *Thomas v. Ann Arbor R. R.*, 114 Mich. 59, 72 N. W. 40; *Robinson v. Railway Co.*, 103 Mich. 607, 61 N. W. 1014. The circuit judge apparently construed the rule above quoted as imposing no obligation upon the motorman to approach the engine house at a reduced rate of speed, but was of the opinion that the four-mile limit was fixed for the period of time when the car was actually passing the forty-two feet in front of the engine house. We think such a construction renders the rule wholly ineffectual to accomplish any good. As pointed out by plaintiff's counsel, if the west line of this engine house had been reached by the car with no apparatus coming out of the house, the safety of all concerned would have been best assured by the car being speedily removed from in front of the engine house. The real purpose of this rule was evidently to challenge the attention of defendant's employees to the necessity of approaching the engine house with the car under control, and fixing a speed of four miles an hour as a safe limit. The existence of this rule did not add to the defendant's obligations to the public, as shown by the opinion of Mr. Justice Hooker, filed herewith. If, however, knowledge of this rule was possessed by the plaintiff, this might have a distinct bearing upon the question of his contributory negligence.

Was the negligence of the driver of this engine imputable to the plaintiff, in such sense as that, if the driver was guilty of contributory negligence, recovery by the plaintiff is precluded? We think not. Whatever may be the rule as to joint undertakers where one may be said to be the agent of the other, or between employer and employee, where one is clearly the agent of another, or between a driver and a mere volunteer, in which case, perhaps, an implied agency may be said to exist, we are unable to see why, in a case like the present, where two fellow servants having duties to perform, the one wholly distinct from the other, are severally engaged in the performance of such duties, the negligence of one should be imputed to the other. The cases are numerous in which the courts have refused to apply the doctrine of imputed negligence in such cases. A case in point is *Bailey v. Jourdan*, 18 App. Div. (N. Y.) 367, 46 N. Y. Supp. 399. In that case two policemen were sent out in an ambulance to secure a prisoner. One drove the wagon. The other (the plaintiff) was inside the ambulance. A collision occurred, to which the negligence of the driver contributed. It was held that, as the plaintiff had nothing to do with the driving, but as this was a separate and independent duty, to which his fellow policeman was assigned, the negligence of the latter could not be imputed to him. *Cray v. R. Co.*, 23 Blatchf. 263, 24 Fed. 168, is an instructive case. In that case the question presented was whether the negligence of a locomotive engineer was to be imputed to a fireman on his engine, as contributory negligence, in an action brought against a stranger road for injuries sustained by the fireman in a collision. It was held that the negligence of the engineer was not so imputable to the fireman. It was said that, although the plaintiff was a fellow servant of the engineer, he was a subordinate, and had no control over the movements of the locomotive. Upon the facts found, he was no more accountable for the misconduct of the engineer than a passenger would be. The same rule was conversely applied when it was sought to impute to the plaintiff, an engineer, the negligence of his fireman, who was a fellow servant. *R. Co. v. Chambers*, 68 Fed. 148, 15 C. C. A. 327. See, also, *Hobson v. Milk Co.*, 25 App. Div. 111, 49 N. Y. Supp. 209, and *Seaman v. Koehler*, 122 N. Y. 646, 25 N. E. 353. And speaking generally, the rule is that, when one is injured by the negligence of a third person concurring with that of a fellow servant, the contributory negligence of the latter constitutes no defense. *Thompson on Negligence*, vol. 1, § 505. There are cases holding that, where two are engaged in a joint enterprise, the one is the agent of the other, in such sense that the negligence of either will be imputed to the other. *Cass v. R. Co.*, 20 App. Div. 594, 47 N. Y. Supp. 356; *Yahn v. City of Ottumwa*, 60 Iowa, 429, 15 N. W. 257; *R. Co. v. Talbot* (Neb.) 67 N. W. 599. These cases rest upon the

Chicago & M. Electric Ry. Co. v. Ullrich

ground of agency, and do not at all militate against the doctrine stated above. Our own case of *Mullen v. Owosso*, 100 Mich. 103, 58 N. W. 663, 23 L. R. A. 693, 43 Am. St. Rep. 436, applied the doctrine of imputed negligence to one sui juris who voluntarily becomes a passenger with another in a vehicle driven by that other. That case has support in adjudicated cases. *Brickell v. Ry. Co.*, 120 N. Y. 291, 24 N. E. 449, 17 Am. St. Rep. 648. But that case does not go so far as to impute the negligence of one fellow servant to another.

For the errors pointed out, the judgment is reversed and a new trial ordered. The other Justices concurred.

CHICAGO & M. ELECTRIC RY. CO. v. ULLRICH.

(Supreme Court of Illinois, Dec. 22, 1904.)

[72 N. E. Rep. 815.]

Personal Injuries—Damages—Future Suffering.*

A plaintiff in an action for personal injuries cannot recover for future suffering unless it is reasonably certain to result from his injuries.

Same—Same—Same—Instruction.

In an action for personal injuries, an instruction that in determining plaintiff's damages the jury should consider such future suffering and loss of health as they may believe she would sustain was not erroneous, on the theory that it did not limit the jury to such future damages as were shown by the evidence, but permitted them to speculate.

Same—Same—Same—Same.

Where, in an action for personal injuries, the evidence was conclusive that at the time of trial plaintiff had not recovered from her injuries, it was proper to instruct on future suffering.

Appeal from Appellate Court, First District.

Action by Paula F. Ullrich against the Chicago & Milwaukee Electric Railway Company. From a judgment of the Appellate Court affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

Fayette S. Munro (M. F. Gallagher, of counsel), for appellant.

James J. Barbour, for appellee.

CARTWRIGHT, J. The Appellate Court for the First

*Right to recover for future suffering, see *Stanley v. Cedar Rapids, etc., Ry. Co. (Iowa)*, 9 R. R. R. 398, 32 Am. & Eng. R. Cas., N. S., 398; foot-note appended to *Chicago & N. W. Ry. Co. v. DeClow (C. C. A.)*, 9 R. R. R. 604, 32 Am. & Eng. R. Cas., N. S., 604; *Adams v. Wilmington & N. Electric Ry. Co. (Del.)*, 4 R. R. R. 307, 27 Am. & Eng. R. Cas., N. S., 307; *International & G. N. R. Co. v. Locke (Tex.)*, 2 R. R. R. 754, 25 Am. & Eng. R. Cas., N. S., 754; *Omaha St. Ry. Co. v. Emminger (Neb.)*, 12 Am. & Eng. R. Cas., N. S., 188; *Yerkes v. Northern Pac. Ry. Co. (Wis.)*, 23 Am. & Eng. R. Cas., N. S., 642 (future mental suffering); *Becker v. Albany Ry. (N. Y.)*, 12 Am. & Eng. R. Cas., N. S., 853.

District affirmed a judgment recovered by appellee in the circuit court of Cook county against appellant for damages on account of personal injuries received in a collision between two cars of appellant, in one of which she was riding as a passenger. The only error alleged by counsel is the giving to the jury of the following instruction at the request of plaintiff: "The court instructs the jury that if you find for the plaintiff you will be required to determine the amount of her damages. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to and they should take into consideration all the facts and circumstances as proven by the evidence before them; the nature and extent of plaintiff's physical injuries and resulting from the street car collision in question, if any, so far as the same are shown by the evidence; her suffering in body and mind, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe, from the evidence before them in this case, she has sustained or will sustain by reason of such injuries; her loss of time and inability to work, if any, on account of such injuries; and may find for her such sum as, in the judgment of the jury, under the evidence and instructions of the court in this case, will be a fair compensation for the injuries she has sustained or will sustain, if any, so far as such damages and injuries, if any, are claimed and alleged in the declaration." The objections to the instruction are, first, that it did not correctly state the law as to future damages; second, that it was improper to give it, because there was no evidence upon which to base it. It is acknowledged that future damages may properly be assessed where the evidence shows that they are reasonably certain to result from the injury. The action being for a single wrong, the plaintiff is entitled to recover all damages, present or prospective, which necessarily result from the injury, and a part of such damages is future pain and suffering and inability to labor. The evidence must show that it is reasonably certain the plaintiff will suffer such damages, and the nature and extent thereof, and the assessment of damages must be based upon such evidence. The first objection to the instruction is that it did not limit the jury to such future damages as the evidence showed were reasonably certain to result from the accident, but permitted them to speculate as to such damages, and to consider merely possible or probable damages. The reply of counsel for appellee to this argument is that the court has repeatedly approved of this instruction as a correct statement of the law. It is true that substantially the same instruction has been before the court in different cases, where various objections to it were considered; but the particular objection now presented has not heretofore been made. Objections not made and questions not raised are not considered, and each decision must be re-

garded only as deciding the question presented for decision. We do not think, however, that the instruction is subject to the objection now made. A plaintiff cannot recover damages for future suffering which is not reasonably certain to result from his injury. 13 Cyc. 138-144. A mere possibility, or even a reasonable probability, that future pain or suffering may be caused by the injury, or that some disability will result therefrom, is not sufficient to warrant an assessment of damages. But we do not understand that this instruction authorized the jury to allow such damages. The damages are to be such as the jury believe, from the evidence, the plaintiff will sustain; not such as are possible or probable. If the evidence shows that the plaintiff will sustain damages in the future, they may properly be allowed, and that is the purport of the instruction.

The second objection is that there was no evidence that it was reasonably certain that the plaintiff would suffer in the future mind or body. The evidence was conclusive that at the time of the trial she had not recovered from her injuries, and it necessarily followed that there would be future damages to some extent. The only debatable question was as to how long and to what extent she would suffer in the future, and that question was necessarily left to the jury to be determined from the evidence. There was evidence on which to base the instruction, and the case was not like that of *Illinois Iron & Metal Co. v. Weber*, 196 Ill 526, 63 N. E. 1008, where the jury were authorized, by an instruction, to speculate on the possibility of damages being suffered six years after the trial, without any evidence that such a result was even probable.

Appellee's counsel asks us to award damages to her on the ground that the appeal was taken merely for delay. A similar motion was made and denied in the Appellate Court, and we are not satisfied that the purpose of the appeal was delay. The motion is therefore denied. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

LAKE ERIE & W. R. CO. v. McFALL.

(Supreme Court of Indiana, Nov. 29, 1904.)

[72 N. E. Rep. 552.]

Fires Set by Locomotives—Negligence—Pleading—Weather Conditions—Spark Arresters—Speed.

A complaint alleging that defendant was operating a railroad through a village in which there were a large number of wooden buildings in close proximity to the track, and on a day when a strong wind was blowing, and it had been unusually dry for a long time, carelessly, negligently, and wrongfully failed to use sufficient spark arresters or other proper appliances to prevent the emission of sparks from its locomotives, and negligently ran the trains at such a high speed that the engines threw out unusually large and dangerous sparks, which set

Lake Erie & W. R. Co. v. McFall

fire to plaintiff's barn, when considered on appeal after a trial in which the issue of negligence was correctly submitted to the jury, sufficiently alleged negligence in respect to the operation of the locomotive, and in permitting fire to escape and destroy plaintiff's barn.

Same—Same—Same—Operation of Locomotive.

In an action against a railroad for the destruction of property by fire, a complaint alleging that defendant negligently and carelessly failed to exercise a degree of care proportionate to the increased danger in operating its locomotive, but negligently so operated it at such a high rate of speed as to cause it to throw out dangerous sparks, sufficiently alleged negligence in respect to the operation of the locomotive.

Motion for Defendant on Interrogations.

On a motion for judgment on answers to interrogatories, the evidence is not to be considered.

Fires Set by Locomotives—Answer to Interrogations.

In an action against a railroad for the destruction of property by fire, where the jury answered in the affirmative a special interrogatory as to whether there was any defect in the construction of the engine or spark arrester, a further answer, in response to a question as to what that defect was, that it was a defect in the spark arrester, was sufficiently specific.

Interrogations.

Where defendant was not entitled to judgment on the answers to special interrogatories, the refusal of the court to require the answer to a certain interrogatory to be made more specific was harmless.

Fires Set by Locomotives—Liability—Instructions—Harmless Error.

In an action against a railroad for the destruction of property by fire, a charge that if plaintiff's barn was set on fire by sparks carried by the wind against the same, and such sparks were thrown from defendant's engine on account of a defective spark arrester, it would make no difference how the engine was being run as to speed or amount of steam, did not mislead the jury, where in other instructions the court charged with great explicitness that plaintiff must show negligence to authorize a finding in her favor, and the jury, in answer to special interrogatories, found the existence of negligence.

Instructions.

Error in the giving and refusal of instructions is waived, where neither their language nor a succinct statement thereof has been set out in appellant's brief.

Appeal—Review.

The Supreme Court will not, on assignments of grounds for a new trial which cover merely the sufficiency or legal effect of the evidence, consider answers to interrogatories.

Fires Set by Locomotives—Negligence—Weather Conditions—Spark Arresters—Speed.*

Where it was a time of drought, and a locomotive was throwing sparks of larger size and for a greater distance than it would have

*For the authorities in this series on the subject of the duties and liabilities of railroad companies relating to fires set by their locomotives (questions of statutory law, damages, and evidence excluded), see foot-notes appended to *Anderson v. Oregon R. Co.* (Ore.), 12 R. R. R. 625, 35 Am. & Eng. R. Cas., N. S., 625 (care required in furnishing spark arresters); and effect of the exercise of due care in furnishing preventive appliances; *Brady v. Jay*, (La.), 11 R. R. R. 269, 34 Am. & Eng. R. Cas., N. S., 269 (liability of logging railroad on account of the absence of spark arresters on engine furnished independent contractor); foot-note appended to *Simpson v. Enfield Lumber Co.* (N. Car.), 9 R. R. R. 457, 32 Am. & Eng. R. Cas., N. S., 457, where all preceding authorities in this series on the subject of negligence of railroads in permitting combustibles to accumulate on their right of way are collected; *Alabama Great Southern R. Co. v. Clark* (Ala.), 9 R. R. R. 589,

Lake Erie & W. R. Co. v. McFall

done if it had had a sufficient spark arrester, which fact the engineer might have discovered from the flying sparks, but nevertheless ran at a high speed with the draft of the locomotive open and its exhaust unusually loud, it was his duty to shut off steam in passing a point in a village at which a barn containing wide cracks through which sparks might enter, and towards which there was a high wind blowing, stood near the right of way.

Appeal from Circuit Court, Hamilton County; W. S. Christian, Special Judge.

Action by Melissa McFall against the Lake Erie & Western Railroad Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under Burns' Ann. St. 1901, § 1337u. Affirmed.

John B. Cockrum and Shirts & Fertig, for appellant.

Dan Waugh, Gifford & Nash, and Kane & Kane, for appellee.

GILLETT, J. Suit by appellee against appellant to recover damages for alleged negligence in permitting sparks to escape from its locomotive and fall upon the barn of appellee, whereby the barn was set on fire and destroyed. The complaint was in three paragraphs, to each of which a demurrer was overruled. There was an answer in general denial. The jury found in favor of appellee on each paragraph of her complaint, and answered certain special interrogatories propounded by appellant. The latter moved for

32 Am. & Eng. R. Cas., N. S., 589 (degree of care required of railroads to prevent fires); *Cratt v. Albemarle Timber Co.* (N. Car.), 7 R. R. R. 84, 30 Am. & Eng. R. Cas., N. S., 84 (liability of private logging railroad for fire communicated by reason of absence of spark arresters); *Ham-burg-Bremen Fire Ins. Co. v. Atlantic Coast Line R. Co.* (N. Car.), 7 R. R. R. 177, 30 Am. & Eng. R. Cas., N. S., 177 (liability of railroad company for fire communicated from combustibles on railroad platform); *Glanz v. Chicago, M. & St. P. Ry. Co.* (Iowa), 6 R. R. R. 213, 29 Am. & Eng. R. Cas., N. S., 213 (negligence of railroad in starting fire on plaintiff's premises as proximate cause of injury to his health from over exertion in putting it out); *Logan v. Wabash Ry. Co.* (Mo.), 6 R. R. R. 274, 29 Am. & Eng. R. Cas., N. S., 274 (proximate cause where personal injuries were sustained in attempting to extinguish fire); *Jefferson v. Chicago, etc., Ry. Co.* (Wis.), 7 R. R. R. 621, 30 Am. & Eng. R. Cas., N. S., 621; *Norfolk & W. R. Co. v. Perrow* (Va.), 7 R. R. R. 611, 30 Am. & Eng. R. Cas., N. S., 611 (sufficiency of evidence of negligence); *Alabama Midland Ry. Co. v. E. Swindell & Co.* (Ga.), 8 R. R. R. 736, 31 Am. & Eng. R. Cas., N. S., 736 (sufficiency of evidence to sustain verdict for plaintiff); *Pittsburgh, C. & St. L. R. Co. v. Wilson* (Ind.), 7 R. R. R. 671, 30 Am. & Eng. R. Cas., N. S., 671 (sufficiency of petition); *Abrams v. Seattle & M. Ry. Co.* (Wash.), 2 R. R. R. 465, 25 Am. & Eng. R. Cas., N. S., 465 (care required of railroad to prevent fires); *Lesser Cotton Co. v. St Louis I. M. & S. Ry. Co.* (C. C. A.), 2 R. R. R. 445, 25 Am. & Eng. R. Cas., N. S., 445 (care required in dry windy weather where inflammable materials); *St. Louis & S. W. Ry. Co. of Texas v. Miller* (Tex.), 1 R. R. R. 874, 24 Am. & Eng. R. Cas., N. S., 874 (liability as affected by use of due care in selecting employees); *Grant v. Omaha, etc., R. Co.* (Mo.), 3 R. R. R. 953, 26 Am. & Eng. R. Cas., N. S., 953 (liability on account of spreading of fire lighted on right of way; and liability of receivers on account of fire set prior to receivership); Mc-

judgment on the answers to interrogatories, and subsequently filed a motion for a new trial. Each of these motions was overruled, and judgment was rendered for appellee upon the verdict. We shall discuss the questions which the record presents in their order.

It is claimed by counsel for appellant that none of said paragraphs contains a sufficient charge of negligence. The first paragraph charges that on April 25, 1902, defendant was operating a line of railroad running east and west through the village of Hobbs, in Tipton county, Ind.; that there was in said village on said day, and for a long time prior thereto there had been, a large number of wooden buildings, consisting of houses, stables, and other structures, standing on either side of defendant's track and in close proximity thereto, and, among others, that there was a barn or stable owned by plaintiff, of the value of \$150, situated about 100 feet north of said track; that on said day there was a wind blowing from the south or southwest across defendant's track, and in the direction of plaintiff's barn or stable; that it was at that time, and it had been for a long time prior thereto, unusually dry, making said building highly inflammable and easily set on fire by sparks or coals of fire; that on said day defendant, in running its locomotives and trains of cars over its tracks, carelessly, negligently, and wrongfully failed and omitted to use safe and sufficient spark arresters or other proper appliances to prevent the emission of sparks and fire from said locomotives, and negligently, carelessly, and wrongfully ran and operated said locomotives and trains of cars at such a high and unnecessary head or amount of steam and

Farland v. Missouri, K. & T. Ry. Co. (Mo.), 2 R. R. R. 656, 25 Am. & Eng. R. Cas., N. S., 656 (liability of domestic proprietor where foreign corporation is permitted to use the road); Chicago & E. R. Co. v. Lesh (Ind.), 4 R. R. R. 20, 27 Am. & Eng. R. Cas., N. S., 20 (ordinary wind not a new and independent agency); Greenwich Ins. Co. v. Louisville & N. R. Co. (Ky.), 1 R. R. R. 605, 24 Am. & Eng. R. Cas., N. S., 605 (right of insurance company to recover against railroad where building was constructed on right of way by permission was destroyed by fire); Armstrong v. Wilmington & W. R. Co. (N. Car.), 4 R. R. R. 706, 27 Am. & Eng. R. Cas., N. S., 706; Southern Ry. Co. v. Pace (Ga.), 1 R. R. R. 604, 24 Am. & Eng. R. Cas., N. S., 604 (sufficiency of evidence of negligence in management of engine); Monograph, 15 Am. & Eng. R. Cas., N. S., 495, et seq.; Peck v. New York Cent. & H. R. Co. (N. Y.), 22 Am. & Eng. R. Cas., N. S., 808 (not liable in absence of negligence; but negligence may be inferred from emission of sparks in unusual quantities); Boston Excelsior Co. v. Bangor & A. R. Co. (Me.), 16 Am. & Eng. R. Cas., N. S., 654; Hoffman v. King (N. Y.), 16 Am. & Eng. R. Cas., N. S., 764 (proximate cause); Alabama & V. Ry. Co. v. Barrett (Miss.), 20 Am. & Eng. R. Cas., N. S., 141; Van Inwegen v. Port Jervis, etc., R. Co. (N. Y.), 20 Am. & Eng. R. Cas., N. S., 352 (proximate cause where fire destroys property after crossing intervening land); Alabama, G. S. R. Co. v. Johnston (Ala.), 20 Am. & Eng. R. Cas., N. S., 909 (sufficiency of complaint); Southern Ry. Co. v. Myers (Ga.), 16 Am. & Eng. R. Cas., N. S., 672; Southern Ry. Co. v. Williams (Ga.), 22 Am. & Eng. R. Cas., N. S., 415 (sufficiency of evidence); Alabama, G. S. R. Co. v. Johnston (Ala.), 20 Am. & Eng. R. Cas., N. S., 909 (wind as intervening cause of destruction of property).

draft, thereby causing said locomotives to emit and throw out unusually large and dangerous sparks and coals of fire, which said sparks and coals of fire defendant negligently and carelessly suffered and permitted to be so emitted, thrown, carried, and spread by said wind off of its right of way and to, upon, and against plaintiff's barn or stable, igniting and setting the same on fire, whereby the same was, without any negligence or carelessness on her part, burned and destroyed, to her damage, etc. The paragraph further alleges matter of excuse for failing to set out what mechanism and construction of spark arrester could or should have been used.

The second paragraph, after alleging the general situation and the condition of drought, as in the first paragraph, and alleging that said conditions were known to the employees of defendant before they had reached or attempted to pass through said village, contains the following: "Yet notwithstanding all of which, said defendant, its agents and employees so engaged in operating and running one of its locomotives and passenger train of cars attached thereto over its track through said town in the afternoon of said day, negligently and carelessly failed and omitted to exercise that degree of care and caution in operating and running said locomotive and train of cars through said village on said day proportionate to the increased danger and risk of setting fire to said building from sparks and coals of fire thrown from said locomotive in running through said village, but negligently and carelessly and wrongfully so ran and operated said locomotive and train of cars through said village at such a high rate of speed and excessive head and amount of steam, unnecessarily overtaxing the power of said locomotive, thereby causing it to emit and throw out unusually large and dangerous sparks and coals of fire, which the defendant, its agents and employees, negligently and carelessly so suffered and permitted to be so emitted and thrown out and carried by said wind off of the defendant's right of way to and against the said barn or stable of the plaintiff, thereby igniting and setting the same on fire, and completely burning it up and destroying it, without any carelessness or negligence on the part of the plaintiff. That the plaintiff, for the want of sufficient knowledge, is unable to set out the facts constituting the negligence of the defendant more specifically than as herein set out."

The third paragraph is substantially the same as the second in respect to the allegations of preliminary facts, but its allegations concerning negligence are: "That said defendant negligently and carelessly failed and omitted to exercise that degree of care and caution proportionate to the increased risk and hazard on account of the conditions above stated, but carelessly and negligently ran one of its passenger trains in the afternoon of said day over its said track through

said town at an unusual and excessive rate of speed; that by reason of which unusual and excessive rate of speed, and excessive pressure of steam in said locomotive, great and unusual quantities of dangerous sparks and coals of fire were emitted and thrown from said engine, which said defendant carelessly and negligently suffered and remitted to be so emitted and thrown and carried and spread by said wind so blowing off of the defendant's right of way, and into and against the plaintiff's barn or stable, igniting and setting the same on fire, whereby the same was burned up and totally destroyed, without any carelessness or negligence on the part of the plaintiff."

It is clear that the first paragraph of the complaint contained a sufficient charge of negligence in respect to the operation of the locomotive. It is also our opinion that, considering the entire allegation relative to the spark arrester, the paragraph mentioned contained a sufficient charge of negligence in permitting fire to escape to and destroy appellee's barn. *Chicago, etc., R. Co. v. Kreig*, 22 Ind. App. 393, 53 N. E. 1033. "Safe" and "sufficient" are relative terms when applied to a spark-arresting device, and the word "prevent" was evidently used by the pleader in the sense of to hinder, check, or retard. The record discloses that the question was fully laid before the jury as to whether the spark arrester in the locomotive which set the fire was of standard pattern and in good order, and it further appears that the jury was correctly instructed as to the measure of appellant's duty in that respect. The pleading, therefore, comes to us so thoroughly impressed with the theory which the trial stamped upon it that we do not feel at liberty to assume that it was the purpose of the pleader in effect to treat appellant as an insurer with respect to the sufficiency of the appliance. In other words, it is a case where the construction suggested by us above must be given the pleading, to the end that the theory of the parties below and of the trial court shall be the accepted theory here.

As to the second paragraph, we think it plain that it contained a sufficient charge of negligence in respect to the operation of the locomotive. It is not to be forgotten that, in a case where the facts alleged disclose a duty, the charge of negligence takes on a technical significance, and that a very general averment relative to what was negligently done or omitted will ordinarily be a sufficient averment of negligence as against a demurrer.

We need not determine whether the third paragraph is sufficient. As above stated, the verdict is shown to rest on each paragraph, and the first and second paragraphs afford a sufficient foundation for a finding in appellee's favor.

We deem it unnecessary to give space to set out in full the findings of the jury in response to the special interrogatories submitted. On a motion for judgment on answers to inter-

rogatories, the evidence is not to be considered, and it cannot be said, considering the double charge of negligence in the first paragraph, that facts might not have been shown under the issues which would have warranted a verdict for appellee on that paragraph, notwithstanding the facts found by the jury. As to the verdict on the second paragraph, we deem it clear that there was no inconsistency between the verdict and the answers to the interrogatories.

The twenty-sixth and twenty-seventh interrogatories propounded to the jury, and the answers returned to said interrogatories, were as follows: "(26) Was said fire caused by reason of any defect in the construction or design of the engine or spark arrester therein? Ans. Yes. (27) If you answer the last question in the affirmative, state what said defect was. Ans. Yes, by defect in spark arrester." The jury, as other answers to interrogatories and the evidence indicate, in its effort to reconcile the testimony introduced by appellant, that said appliance was in good order at the time that the locomotive started on its westward trip, with the testimony that it was spreading fire between the city of Elwood and the city of Tipton, which are situate on either side of the village of Hobbs, adopted the theory that the spark arrester was out of repair from the time of leaving Elwood. The jury also found that although the trainmen might have discovered, by the exercise of due care, the fact that sparks were escaping, so as to have prevented the fire complained of, yet it was not practicable to make an examination of the appliance while the locomotive was fired up. The spark arrester was not offered in evidence, and there was no direct testimony as to its condition after the locomotive started on said trip. In these circumstances we think that the trial court did not err in refusing to require the jury to make a more specific and definite answer to the twenty-seventh interrogatory. Taking the facts which the jury found to exist, it is evident that it was purely a matter of conjecture as to the precise nature of the defect in the spark arrester during the time that the locomotive was running between Elwood and Tipton. The answer was as certain as appellant was entitled to under the facts. *McDoel v. Gill*, 23 Ind. App. 95, 53 N. E. 956.

The answer to the twenty-fifth interrogatory, when construed in connection with the eighteenth interrogatory and the findings above indicated, makes it tolerably clear in what respect, in the jury's opinion, the conductor "failed to use sufficient caution under existing circumstances." But the matter just referred to is really, in view of the findings, an excrescence upon the case, and, whatever answer the jury might have made concerning the conductor, appellant would not have been entitled to judgment on the answers to interrogatories. Therefore the refusal of the court to require the answer to the eighteenth interrogatory to be made more specific and definite was in any event harmless.

Instruction No. 18, given by the court to the jury, was as follows: "If you believe from all of the evidence in the case that the plaintiff's barn or stable was set on fire and destroyed by sparks or coals of fire that were carried by the wind to and against the same, and that such sparks and coals were thrown and emitted from the defendant's engine on account of the defective and insufficient spark arrester used on or with such engine, in such case it would make no difference as to the manner in which said engine was being run as to speed or amount of steam." Appellant's counsel complain of this instruction because it omits the element of negligence. It will be observed that the instruction did not charge that appellee was entitled to recover without proof of negligence. The second instruction stated the gist of the first paragraph of the complaint, and charged the jury that, "in order to find for the plaintiff under this paragraph, you must be able to find by a preponderance of the evidence that the proximate cause of the fire was the alleged negligent operation of the engine, or the alleged negligent failure to use safe and sufficient spark arresters to prevent the emission of fire from the engine." The fifth instruction given to the jury was as follows: "The duty of the defendant to provide screens and contrivances to prevent the emission of sparks or spread of fire was limited to such contrivances as had already been tested and put in use, and it was not required to use every possible contrivance or means which scientific discussion might recommend for such purposes. It was required only to use reasonable care, and to avail itself of the best mechanical contrivances in known practical use. If, therefore, you find that the defendant's locomotive was provided with the best known spark arrester in practical use, and with the most approved mechanical devices for preventing the spread of fire, no negligence can be attributed to the defendant by reason of the condition of said locomotive, if such contrivances and devices were in proper repair, although the evidence may show that said locomotive emitted dangerous sparks of fire." The sixth instruction which the court gave to the jury was in the following words: "As negligence is the gist of the action, the burden is on the plaintiff to prove the negligence charged. And although it shall appear from the evidence that the plaintiff's property was set on fire by a spark from the defendant's locomotive, this of itself does not justify the inference that the defendant was negligent in causing or suffering the spark to be so emitted." The eighth instruction which the court gave reads thus: "A railroad company must exercise reasonable care to provide the most effective contrivances in known use to prevent escape of sparks and coals, but it is not an insurer of their completeness or perfection." The second, fifth, sixth, and eighth instructions were given by the court at the request of appellant. The fourteenth instruction was in the

following words: "Neither is it necessary for the plaintiff to recover for her to prove by direct testimony the particular act or acts of negligence charged in the complaint which caused the damage complained of. It will be sufficient on this point if it is shown by all of the facts and circumstances in the case." The eighteenth instruction does not meet with our approval, but we have concluded, since it did not necessarily create the inference that negligence was not an element which was requisite to appellee's recovery, and as the court had charged with great explicitness that she must make out a case of negligence as charge to authorize a finding in her favor, and judging of the matter in the light of the facts found specially in answer to interrogatories, that the jury was not misled by said instruction.

Appellant's counsel complain of the giving and refusal of certain other instructions, but, as neither their language nor a succinct statement thereof has been set out in appellant's brief, we are constrained to hold that all questions relative to said instructions are waived. *Penn. Mutual Life Ins. Co. v. Norcross* (at last term) 72 N. E. 132; *Cleveland, etc., R. Co. v. Stewart*, 161 Ind. 242, 68 N. E. 170; *Pittsburgh R. Co. v. Wilson*, 161 Ind. 701, 66 N. E. 899; *Perry, etc., Co. v. Wilson*, 160 Ind. 435, 67 N. E. 183; *McElwaine-Richards Co. v. Wall*, 159 Ind. 557, 65 N. E. 576.

There was expert evidence showing that a locomotive with a standard spark arrester properly adjusted would not throw sparks of the size and for the distance that the locomotive was shown to have thrown them on the trip in question, and, notwithstanding the conclusion of the jury that the spark arrester was in good order when the locomotive started westward, there was room for the opposite inference from the circumstances of the case. Appellant's counsel argue that the evidence is insufficient, on the assumption that the answers to interrogatories serve the purpose of excluding the hypothesis that negligence existed with reference to providing a sufficient spark arrester. The rule in this court is that, on assignments of grounds for a new trial which question merely the sufficiency or legal effect of the evidence, the court will not consider answers to interrogatories. *Chicago, etc., R. Co. v. Kennington*, 123 Ind. 409, 24 N. E. 137; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *Ohio & Mississippi R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Sievers v. Peters Box, etc., Co.*, 151 Ind. 642, 50 N. E. 877, 52 N. E. 399. But even upon the hypothesis of the correctness of the jury's answers to interrogatories, we think that the case was made out. Appellant itself was charged in the first paragraph of the complaint with negligently failing and omitting to use a proper appliance to prevent the emission of sparks, and also with negligently and carelessly running the locomotive with a high and unnecessary amount of steam and draft, thereby causing it to emit

Rideout v. Winnebago Traction Co

and throw out large and dangerous sparks and coals of fire. Whatever may be the right of a railway company to operate its trains at such speed as it sees fit, where it has a proper and sufficient equipment, yet in this case, where the evidence shows that it was a time of drought, that the locomotive was throwing sparks of larger size and for a greater distance than it would have done if it had had a sufficient spark arrester, that the engineer might have discovered the fact from the flying sparks, that the locomotive was running at a high speed and with its draft open, that the exhaust was unusually loud, that the barn of appellee stood near the right of way and contained wide cracks through which sparks might enter, and that there was a high wind blowing from the right of way in the direction of the barn, we think that it was the duty of the engineer, as the jury specifically found, to shut off steam in passing that point.

Judgment affirmed.

RIDEOUT et al. v. WINNEBAGO TRACTION CO.

(Supreme Court of Wisconsin, Dec. 13, 1904.)

[101 N. W. Rep. 672.]

Negligence—Willfulness.*

The term "negligence" by itself suggests only inadvertence or want of ordinary care, and however great may be the degree of such want of care, so long as the element of inadvertence remains, willfulness is excluded.

Gross Negligence.†

The term "gross negligence" signifies willfulness. It involves intent, actual or constructive, which is a characteristic of criminal liability. If one is guilty of inadvertence causing injury to another, that one's fault is denominated want of ordinary care. If one is guilty of willful misconduct causing actionable injury to another, the former's fault is denominated "gross negligence."

Complaint—Indefiniteness—Conflicting Theories.

Since in the first case suggested intention to do the injury, actual or constructive, must be absent and in the second case present, a com-

*For definitions of willfulness, wantonness and recklessness, see *Gosa v. Southern Ry. (S. Car.)*, 11 R. R. R. 693, 34 Am. & Eng. R. Cas., N. S., 693 (a willful act means an act showing that a person intended to do what was done, and a wanton act means an act done in total disregard of the rights of others); note appended to *Louisville & N. R. Co. v. Brown (Ala.)*, 14 Am. & Eng. R. Cas., N. S., 794 (willfulness); note appended to *Louisville & N. R. Co. v. Anchors (Ala.)*, 11 Am. & Eng. R. Cas., N. S., 657 (definition of recklessness when applied to negligence); *Highland Ave. & B. R. Co. v. Robinson (Ala.)*, 19 Am. & Eng. R. Cas., N. S., 357 (while wantonness and recklessness conjunctively legally impart the same as intentional wrong, an act may be done wantonly and recklessly, and an injury be thereby inflicted, and in such manner, without an intent or wish to inflict the injury).

†For definitions of gross negligence, see foot-note appended to *Chesapeake & O. Ry. Co. v. Board (Ky.)*, 10 R. R. R. 701, 33 Am. & Eng. R. Cas., N. S., 701, where all preceding authorities in this series are collected.

Rideout v. Winnebago Traction Co

plaint using language to describe defendant's fault appropriate to both species of misconduct, as if they occurred at one and the same time, and that one included the other, is indefinite and uncertain.

Gross Negligence.

Gross negligence does not include ordinary negligence, and proof of the former does not prove but rather disproves the latter.

Indefiniteness of Complainant—Conflicting Theories—Inconsistent Findings.

Where a complainant is indefinite and uncertain because of the pleader's confusing the element of advertence with that of inadvertence, ordinary negligence with gross negligence, and the attention of the trial court is called thereto, though not in the most approved manner, it should compel the plaintiff to proceed upon one theory or the other, if both theories can be reasonably spelled out of the pleadings, or give such permissible construction to the pleadings as to confine plaintiff's claim to one species of wrongdoing.

Same—Double Aspect.

Where a complainant has a double aspect rendering it indefinite and uncertain, as above indicated, it is error to submit the cause to the jury upon both aspects, and in case error is committed in that regard resulting in a verdict in favor of the plaintiff upon the ground of gross negligence and ordinary negligence as well, it is error to render judgment thereon because of inconsistency in the findings.

(Syllabus by the Judge.)

Appeal from Circuit Court, Winnebago County; George W. Burnell, Judge.

Action by W. K. Rideout and George A. Sarau, administrators of the estate of Christian Sarau, deceased, against the Winnebago Traction Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Action for damages for the alleged wrongful killing of plaintiffs' intestate. The circumstances stated as a ground for a recovery are substantially these: From June 22, 1897, up to and inclusive of the event complained of defendant was a corporation duly organized under the laws of this state, and authorized to operate an electric street railway on various streets, including Merritt street, in the city of Oshkosh, Wis. August 24, 1903, the Uniformed Rank Knights of Pythias in such city, some being on foot and some being in carriages, —one of the former being Christian Sarau,—marched in parade formation along the street specially mentioned, escorted by a military band of twenty-four pieces discoursing music. Some of the marchers, including Sarau, in the exercise of ordinary care walked between the rails of defendant's track located on such street, and others walked on either side thereof. While so doing defendant's servant with one of its cars approached the procession from the rear at a dangerous rate of speed, without giving any sufficient warning to the marchers to yield the right of way before reaching them. The car going at such dangerous rate of speed, without sufficient warning being given as aforesaid, was carelessly, negligently, recklessly and wantonly propelled into the space occupied by the marchers and on to and over said Sarau, causing injuries from which he on the same day died.

Rideout v. Winnebago Traction Co

Sarau suffered great mental and physical pain from the instant he was injured till death occurred, and plaintiffs as his personal representatives were put to great expense by reason of such wrongful conduct for medical and surgical care of and attendance upon Sarau, and for nursing and hospital bills.

Several times in the complaint the conduct of the defendant's servant, who controlled the car, was characterized as careless, negligent, reckless, willful and wanton, or by words of similar import. Allegations were made appropriate to a cause of action for damages to Sarau, which survived to his personal representatives, and also a cause of action for damages to his surviving relatives, the whole amount claimed being \$10,000.

Defendant answered putting in issue the allegations of the complaint as to its servant having negligently operated the car on the occasion in question, and pleaded as the proximate cause of the injury and death of Sarau,—want of ordinary care on his part.

It fairly appears from the record, in harmony with the claim of respondents' attorneys upon the argument of the case in this court, that respondents' right to recover was intended to be grounded on gross negligence. The court, nevertheless, refused to construe the complaint in harmony therewith, and submitted the cause to the jury for specific findings covering the subject of liability for ordinary negligence, and for gross negligence as well. The result was the following verdict:

(1) Sarau came to his death by injuries received at the time and place alleged in the complaint. (2) Defendant's employees were guilty of want of ordinary care and prudence in operating the car at the time of the accident. (3) Such want of ordinary care and prudence was the proximate cause of the injury to Sarau. (4) The motorman was guilty of gross negligence; his conduct was malicious, wanton and reckless, evincing a disregard of consequences to others. (5) The car was going at a speed of 15 miles an hour when it ran through the band, before it reached Sarau. (6) He could not have seen the car approaching him in time to have avoided the collision. (7) The motorman did not try to stop the car upon its becoming apparent to him that it would strike Sarau. (8) When the accident occurred the car was running at the rate of 15 miles an hour. (9) Want of ordinary care on Sarau's part did not contribute to produce the injury. (10) Damages were caused by the occurrence, for doctors' bills and hospital bill \$75, funeral expense \$421, physical pain and mental suffering of Sarau \$500, loss to his surviving relatives by his death \$4,500.

After the coming in of the verdict the court changed finding 6 so as to decide that Sarau could have seen the approaching car in time to have avoided the collision.

Exceptions were duly taken to preserve for review numerous questions, including those discussed in the opinion, so

Rideout v. Winnebago Traction Co

far as exceptions were necessary in that regard. Judgment was rendered in plaintiff's favor on the verdict, from which this appeal was taken.

Weed & Hollister and Charles Barber (of counsel), for appellant.

Bouck & Hilton, A. E. Thompson, and John F. Kluwin, for respondents.

MARSHALL, J. (after stating the facts). It seems that from the time of drawing the complaint to the entry of judgment there was want of appreciation of the broad distinction between ordinary negligence and intentional wrongdoing, the former being characterized by inadvertence and the latter by advertence, the one requiring intent, actual or constructive to injure, and the other being inconsistent therewith. Under the decisions of this court, and by the better rule, it is believed, prevailing wherever the doctrine of comparative negligence does not prevail, as it does not here, that species of wrong, which has been denominated in this and some other jurisdictions gross negligence, is impossible if there is mere want of ordinary care. Therefore to charge that an alleged wrongdoer was guilty of one species of wrongful conduct, and allow a recovery for guilt of the other, or to charge both as characterizing the same wrongful act and allow a general recovery is wrong. A pleading with such an infirmity is indefinite and uncertain and open to a motion on that ground. The practice of charging that one caused injury to another by careless, negligent, wanton and willful misconduct, or of using language of similar import in attempting to state a cause of action is improper. This court so held, in effect, in *Bolin v. C., St. P., M. & O. Ry. Co.*, 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911, and cases there referred to, and so held expressly in *Wilson v. Chippewa Valley Electric R. Co.*, 98 N. W. 536. In the former this language was used:

"Inadvertence, in some degree, is the distinguishing characteristic of negligence, while misconduct of a more reprehensible character, characterized by rashness, wantonness and recklessness of a person as regards the personal safety of another, has been designated by this court as gross negligence." That involves "a sufficient degree of intent at least to be inconsistent with inadvertence."

In the last case cited this court said of the effect of the decision in the *Bolin Case* as to a wrong of this nature, (one alleged to have been characterized by wantonness and willfulness):

"There is really no element of inadvertence, which is a necessary element of negligence, and hence the term 'gross negligence,' as applicable to this class of wrongs, is inaccurate. The conclusion is that when this kind of wrong is charged, as in the present case, though to be called 'gross negligence,' it does not logically include ordinary negli-

gence any more than a charge of ordinary negligence includes intentional wrong."

In *Decker v. McSorley*, 116 Wis. 643, 93 N. W. 808, it was said that:

"No degree of mere carelessness or inadvertence constitutes gross negligence or willful misconduct."

And in *Watermelon v. The Fox River Electric Railway & Power Co.*, 110 Wis. 153, 85 N. W. 663, that:

"It is obvious that no degree of mere carelessness or inadvertence, however remote from the care customarily used either by the ordinary careful man or by the exceptionally careless one, constitutes gross negligence." The latter suggests necessarily intent, either actual or constructive, to cause injury, or "conduct evincing a total disregard for the safety of persons or property."

The doctrine above indicated is not supported by authorities universally, though the want of hamony will be generally found to grow out of the fact that the doctrine of comparative negligence prevails in some jurisdictions and not in others. Authorities on both sides of the question are cited in *Wilson v. Chippewa Valley Electric R. Co.*, *supra*. The idea that gross negligence is inconsistent with ordinary negligence seems to be the logical result of such a distinction between the two species of wrongs as to render it impossible for the element of inadvertence to be common to both. It were better if the term "gross negligence" as suggesting inadvertence had never been used in speaking of a wrong, having the element of intent, actual or constructive, to injure. The Supreme Court of Indiana in treating this subject in *Louisville, New Albany & Chicago R. Co. v. Bryan*, 107 Ind. 51, 53, 7 N. E. 807, 808, used this language:

"To constitute a willful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. It involves conduct which is quasi criminal. * * * The words 'careless' and 'negligent' used in conjunction, have not always been employed with strict regard for accuracy of expression. To say that an injury resulted from the negligent and willful conduct of another, is to affirm that the same act is the result of two exactly opposite mental conditions. It is to affirm in one breath that an act was done through inattention, thoughtlessly, heedlessly, and at the same time purposely and by design. * * * It is only necessary to say that the distinction between cases falling within the one class or the other, is clear and well defined, and cases in neither class are aided by importing into them attributes pertaining to the other."

In the *Cleveland, etc., R. W. Co. v. Miller*, Adm'r, 149 Ind. 490-501, 49 N. E. 445, 449, that court said:

"The two terms ('negligence' and 'willfulness') are incom-

Rideout v. Winnebago Traction Co

patible. Negligence arises from inattention, thoughtlessness, or heedlessness, while willfulness cannot exist without purpose or design. No purpose or design can be said to exist where the injurious act results from negligence, and negligence cannot be of such a degree as to become willfulness.

* * * The doctrine of comparative negligence does not obtain recognition in this state * * * and when willfulness is the essential element in the act or conduct of the party charged with the wrong, the case ceases to be one of negligence. Willfulness and negligence are the opposites of each other; the former signify in the presence of intention and the latter its absence."

To the same effect are *Parker, Adm'r, v. The Pennsylvania Company*, 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552; *Highland Avenue & Belt Railroad Co. v. Winn*, 93 Ala. 306, 9 South. 509; *Louisville & Nashville Railroad Co. v. Johnston*, 79 Ala. 436; *Levin v. Memphis & Charleston Railroad Co.*, 109 Ala. 332, 19 South. 395; *Wabash Railroad Co. v. Speer*, 156 Ill. 244, 40 N. E. 835; *Ruter v. Foy*, 46 Iowa, 132; *Matthews v. Warner's Adm'r*, 29 Grat. 570, 26 Am. Rep. 396; *Denman v. Johnston*, 85 Mich. 387, 48 N. W. 565; *Menger v. Laur*, 55 N. J. Law, 205, 26 Atl. 180, 20 L. R. A. 61; and *Am. & Eng. Enc. of Law* (2d Ed.) vol. 7, 443. From the foregoing it will be seen that in charging liability, either springing from the want of ordinary care or an intentional wrong, causing personal injury to one, nothing is to be gained by a multiplicity of adjectives or adverbs. When it is stated that the wrongdoer failed to exercise ordinary care in a case grounded on ordinary negligence, or that he acted willfully in a case based on gross negligence, so called, nothing in any circumstances can be added by otherwise characterizing the wrong, except by way of emphasis, which of course is immaterial to the liability, or the measure thereof. In confusing the two species of wrong, as if one was of the same character as the other, only greater in degree, there is liability of rendering the pleading indefinite and leading to a fatal variance between it and the proof and also to an inconsistent verdict.

There was an objection here to any evidence under the complaint because of uncertainty of the nature above spoken of. The theory of appellant's counsel seems to have been then, and to be still, that the charge of inadvertent conduct and of willfulness neutralized each other, rendering the complaint insufficient to state any cause of action. We think otherwise. In a case of this kind, while it is true a charge of gross negligence will not warrant a recovery on the ground of ordinary negligence, even though accompanied by an allegation that plaintiff was in exercise of ordinary care at the time of the occurrence complained of, it does not necessarily follow that a charge including both elements of wrongful conduct is meaningless. If very strict technical rules of pleading

Rideout v. Winnebago Traction Co

were applied it might be otherwise. Under the proper rule every reasonable intendment is to be considered in favor of the pleading and everything essential to the cause of action sought to be stated, reasonably inferable from the language used, is to be deemed as effectually pleaded as if expressly alleged. Section 2668, Rev. St. 1898; *Morse v. Gilman*, 16 Wis. 504; *Flanders v. McVickar*, 7 Wis. 372; *Horn v. Ludington*, 28 Wis. 81; *Merrill v. Merrill et al.*, 53 Wis. 522, 10 N. W. 684; *Miller v. Bayer et al.*, 94 Wis. 123-126, 68 N. W. 869; *South Bend Chilled Plow Co. v. George C. Cribb Co.*, 97 Wis. 230, 72 N. W. 749. Or as stated thus in some of the cases cited:

"If the essential facts can be gathered from the pleading or may reasonably be inferred from the allegations it is good though such allegations being in form uncertain and incomplete."

It is considered that a charge that an act was negligently, carelessly and willfully done, or done negligently, carelessly and in disregard of consequences as to the personal safety of others, though open to a motion to make more definite and certain by removing the feature rendering it necessary to determine by construction what character of wrong is relied upon may reasonably be said to charge gross negligence. Therefore the objection to evidence under the complaint was properly overruled. However, since the objection directed attention to a probability that the pleader may have intended to charge both ordinary negligence and gross negligence, to set forth two causes of action of a somewhat inconsistent character, the court in overruling it should have construed the complaint, and shaped the trial accordingly. In *Wilson v. Chippewa Valley Electric R. Co.*, supra, this court construed a complaint charging an alleged wrongful act to have been perpetrated negligently and willfully as stating a cause of action involving gross negligence, and tested the sufficiency of the verdict thereby, holding, that upon such a complaint there cannot be a recovery on the ground of ordinary negligence, consistent with *McClellan v. Chippewa Valley Electric R. Co.*, 110 Wis. 326, 85 N. W. 1018, where it was decided that in a complaint charging ordinary negligence there can be recovery on the ground of gross negligence.

The practice adopted here of declining to construe the complaint as to the particular species of wrongdoing intended to be charged therein and confining plaintiff thereto, and permitting a recovery upon the ground of ordinary and gross negligence as well, is very reprehensible. To allow such a practice to gain a foothold in our system would lead to prejudicial confusion and uncertainty in the administration of justice. The jury were directed to find as to issues appropriate to two distinct and somewhat inconsistent causes of action, when the complaint should have been construed as

Rideout v. Winnebago Traction Co

charging but one. It should have been held to state a cause of action for gross negligence. We have a verdict finding that degree of wrong, and in effect finding that a lesser degree was the proximate cause of the injury. It may appear somewhat technical to hold that such a verdict presents a well defined and fatal inconsistency, but the practice contemplated by the Code that the plaintiff shall state, understandingly to the defendant and the court, the facts as to the cause of action he relies upon, and if there are two causes that they shall not be inconsistent, and that the recovery shall be in harmony therewith, is so invaded by that adopted by the trial court that we feel constrained to condemn it, not overlooking section 2829, and the scope thereof, as declared by this court, in saving judicial decisions from disturbance regardless of errors not affecting the substantial rights of the adverse parties.

Since no recovery can be sustained under the complaint for ordinary negligence, all questions presented upon the appeal, appertaining to the subject of contributory negligence of Sarau, are immaterial and will therefore not be considered. If the injury was caused by gross misconduct of appellant's servant, conduct involving at least constructive intent to do the act complained of, whether Sarau did or did not exercise ordinary care to protect himself does not affect the right of respondents to recover, either for the damages caused to the decease or to the surviving relatives. *Bolin v. C., St. P., M. & O. R. Co., supra.*

The point is made that there was no evidence of willful misconduct on the part of appellant's servant, who controlled the car, and therefore a verdict should have been directed in appellant's favor. It seems to us otherwise. There was evidence tending to show that when the car reached a point where the motorman was in full view of the marchers, and for a considerable period of time thereafter, he must have observed the danger those in its pathway were in and had ample opportunity to guard against it; that he must have seen that the marchers were proceeding entirely unconscious of the approach of his car; that with the noise of the band and other noises made by them it was quite improbable that they would, or might not, observe the car in time to give way for it to pass; that by repeated signals from the conductor he was directed to slacken the speed of the car, and if necessary stop it before reaching the space occupied by the marchers, and that, nevertheless, he made no effort to do so until it had traveled through a large part of such space and up to within a few feet of Sarau, at the rate of 15 miles per hour, or about 22 feet per second. A jury might well find under such circumstances conscious disregard of human life, rendering the wrongdoer in case of a destruction thereof guilty of manslaughter in a criminal action, and of willful misconduct in a civil action. True, the car had the right of way and it

Rideout v. Winnebago Traction Co

was the duty of the marchers to step aside so as not to interfere with its passage or speed. True, it was the duty of the marchers, as is ordinarily the case, to use their senses reasonably, to enable them to do that before the car came dangerously near them, and yet no excuse is seen for an assertion of a superior right in appellant by consciously running its car into the parade at a speed of 22 feet per second.

A person with Sarau at the place of the injury when he regained consciousness in answer to this question, "What did he say if anything that would indicate pain and suffering?" said:

"He raised his right leg, at that time he knew he was hurt and he didn't know whether his leg was off or whether it was cut although he felt the pain and he thought they were either squeezing it or doing something to it and he wanted us to let go, seeing we didn't let go he raised his right leg and tried to kick us and we held his right leg down."

It is easily seen that the answer is not responsive to the question. Error is assigned because the court refused to strike it out. Whether appellant was, or may have been, prejudiced thereby does not clearly appear. As a rule unresponsive answers by a witness should be promptly stricken out, upon a motion being seasonably made therefor. The orderly conduct of trials requires that litigants shall have a reasonable enforcement of that rule.

Several witnesses were permitted to testify to what they heard Sarau say, or do, or how he acted shortly after he was injured, some of the occurrences being while he was on the way to the hospital from the place of the injury, and some immediately upon, or soon after, his arrival at the hospital, indicating that he was conscious and suffering pain. That was proper. Exclamations and expressions such as commonly, under the circumstances, evince suffering, the conditions being such as to indicate reality, may be testified to by a person having knowledge thereof upon the ultimate fact which they suggest becoming proper subject of inquiry. Such evidence falls within the rules allowing all parts of the *res gestæ* as to a subject of judicial inquiry to be given in evidence. *Hall v. The American Masonic Accident Association*, 86 Wis. 518, 57 N. W. 366; *McKeigue, Adm'x, etc., v. The City of Janesville*, 68 Wis. 50, 31 N. W. 298; *Quaife et al. v. Chicago & Northwestern Ry. Co.*, 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821; 1st Greenl. on Evidence, § 102; and *Jones on Evidence*, § 352. The doctrine that a person's state of mind as to existing pain can be so established necessarily includes establishing consciousness. Both matters were material in this case. One could not really suffer pain without possessing some degree of consciousness. The indications of one would ordinarily evince the other. But independently of that, doubtless, the state of a person's mind as regards consciousness, when material, may be established by

Rideout v. Winnebago Traction Co

the species of evidence competent to establish the fact of suffering pain.

Evidence was permitted as to what the duties of a motorman were, operating a car manned by a conductor, as in this case. The question was evidently not aimed at what the duty of the motorman was, as a matter of law, but as to what the incidents of his position were in that regard under his contract of employment. Presumably, the purpose of the question was to show that he was not required to do anything interfering with observing the situation of those upon the track in the pathway of his car on the occasion in question, and that he recklessly and consciously disobeyed the conductor's orders to stop the car before the event complained of. The bearing of the evidence was on the claim of willful misconduct imputable to appellant. In that light we see no reason why the evidence was not proper.

Further complaint is made because evidence was permitted as to the schedule time for running cars the week before the accident. We are unable to see how appellant could possibly have been prejudiced by that. There was no claim that the speed of car on the day of the accident was greater than usual. The only difference in the schedule on that day and on the week prior thereto, was that on the former, contrary to the latter, the cars were operated one way only, giving patrons the benefit of two opportunities to go in that direction in the time ordinarily occupied by a trip down the track and return. It was certainly proper to show the manner in which cars were operated at the time of the injury, and that there was a special arrangement for the occasion for the better convenience of patrons.

Error is assigned because one, who was in the procession some distance behind Sarau, was permitted to testify that as the car passed him, he said, "For God's sake stop that car!" It was then in dangerous proximity to Sarau. The exclamation was made within hearing distance of the motorman. He may, or may not, have heard it. It was within the probabilities that he did. So the evidence, though not competent to show the speed of the car, or that it was going at a dangerous rate of speed, was competent as bearing on the question of whether the motorman operated the car in conscious disregard of the safety of others.

One of the marchers, who was some distance behind Sarau, having testified, without objection, that seeing the danger to those on the car track, he stepped forward to take hold of some of them, his idea being to run on to the track for that purpose, but that there was no show and he stepped back, was permitted to answer a question as to why there was no show. The answer was not strictly responsive thereto, but there was no motion to strike it out. The question merely asked for an explanation of previous evidence. No reason is suggested, or is received, why that was not

Rideout v. Winnebago Traction Co

proper. A number of other rulings on evidence adverse to appellant are referred to in the briefs of counsel. We have given such attention thereto as seems to be required without discovering any prejudicial error therein.

Complaint is made because the court did not submit the following questions to the jury, as requested: "Did the motorman sound the gong continuously while approaching Sarau?" "At what rate of speed was the car running when it ran into the Milwaukee Uniformed Rank Knights of Pythias?" It is a sufficient answer, thereto to say that the questions only involved evidentiary circumstances, not issues of fact raised by the pleadings, within the meaning of section 2858, Rev. St. 1898; *Baxter v. Chicago & Northwestern R. Co.*, 104 Wis. 307, 80 N. W. 644; *Mauch v. City of Hartford*, 112 Wis. 40, 87 N. W. 816; and *Patnode v. Westenhaver*, 114 Wis. 460, 90 N. W. 467. There is no allegation in the complaint or the answer as to whether the gong of the car was continuously sounded while the car was approaching Sarau, or at what rate of speed it was going at the time of the injury. The allegations of the complaint are to the effect that it was then moving at a dangerous rate of speed, and that due and sufficient warning was not given to persons in the pathway thereof to give way for its passage. These allegations were put in issue by denials, and in addition defendant answered that as the car approached the point where the injury was inflicted, a sufficient warning of its presence was given by sounding the gong and bell on the car. So the real issue raised was whether the car, under the circumstances, was approaching at a negligent rate of speed, and whether sufficient warning was given to persons in its pathway to clear the track for its passage. These matters were, though not in the most approved form, included in the questions submitted.

Error is assigned because the court refused to instruct the jury that had Sarau lived his earning capacity would probably have decreased with advancing years. It would seem that appellant could not have been prejudiced by a failure to instruct on such a matter of common knowledge.

Further error is assigned for a refusal to instruct the jury that the probable earning capacity of Sarau should be considered with reference to his capacity in that regard, taking into consideration his personal expenses, income from property not being considered. The general instructions so informed the jury. That being the case there was no error in refusing to specially instruct as to the same matter.

Some complaint is made of remarks by respondents' counsel during the argument to the jury, which do not appear to merit special attention. The exceptions in regard thereto have been sufficiently examined to satisfy us that at least no prejudicial error was committed in respect to such matters.

The judgment must be reversed and the action remanded for a new trial of the cause of action for gross negligence, it

Southern Ry. Co. v. Horine

being understood that the issues appropriate thereto are the only ones which the complaint justifies submitting to a jury for determination. It is unfortunate that a verdict was taken, which in effect found that such a wrong produced the death of Sarau, and that it was also produced by a wrong of an entirely different character.

The judgment appealed from is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

SOUTHERN RY. CO. v. HORINE.

(Supreme Court of Georgia, Dec. 9, 1904.)

[49 S. E. Rep. 285.]

Fires Set by Locomotives—Petition—Amendment—New Cause of Action.

A petition alleging that fire, which the defendant railway company carelessly permitted to escape from its locomotive, ignited litter which the company had permitted to accumulate on its right of way, and, spreading therefrom, burned plaintiff's property, was amendable by alleging that the company "carelessly" permitted the litter to accumulate. Such amendment did not set up a new cause of action (*City of Columbus v. Anglin*, 48 S. E. 318, 120 Ga. 785), nor add a second count to the petition.

Negligence.*

The words "carelessly" and "negligently" are synonymous.

Petition—Amendment—Limitations.

The general rule is that an amendment to a petition relates back to the time of the filing of the original petition, which is the only date to be considered, relatively to the pleadings, on the question as to whether the action is barred by the statute of limitations.

Trespass—Right of Action.

"Possession of land under a claim of ownership being prima facie evidence of title in the occupant, the latter, upon proof of such possession, and without showing complete title, may maintain against a wrongdoer an action for a trespass upon the property, committed while such possession existed." *McDonough v. Carter*, 25 S. E. 938, 98 Ga. 703.

Fires Set by Locomotives—Right of Action—Liability—Sufficiency of Evidence.

In the present case there was evidence from which the jury could

*For definitions of negligence in this series, see *Milligan v. Texas & N. O. R. Co.* (Tex. Civ. App.), 2 R. R. R. 233, 25 Am. & Eng. R. Cas., N. S., 233 ("the failing to exercise that degree of care which persons of ordinary prudence would thus use under the same or similar circumstances"); *Ullman v. Chicago & N. W. Ry. Co.* (Wis.), 23 Am. & Eng. R. Cas., N. S., 782 ("accident" includes actionable negligence); *Bradley v. Ohio River & C. Ry. Co.* (N. Car.), 18 Am. & Eng. R. Cas., N. S., 340 ("the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation; the omission to use means reasonably necessary to avoid injury to others"); *McGraw v. Chicago, R. I. & P. Ry. Co.* (Neb.), 18 Am. & Eng. R. Cas., N. S., 764 ("the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do"); *Western & A. R. Co. v. Vaughan* (Ga.), 21 Am. & Eng. R. Cas., N. S., 512 (the standard of negligence is what an ordinarily prudent man would do under the same circumstances, and not what the injured person thought was proper, or did in good faith).

Metropolitan St. Ry. Co. v. Gilbert

have found that the plaintiff below was in the actual possession of the land upon which the property burned was situated, claiming it as his own: and the contention of the plaintiff as to the liability of the defendant for the damages caused by the fire was not without evidence to support it.

(Syllabus by the Court.)

Error from Superior Court, Haralson County; A. L. Bartlett, Judge.

Action by V. C. Horine against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Hugh M. Dorsey, for plaintiff in error.

James Beall and Price Edwards, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur.

METROPOLITAN ST. RY. CO. v. GILBERT et al.

(Supreme Court of Kansas, Dec. 1, 1904.)

[78 Pac. Rep. 807.]

Street Railroads—Injury To Pedestrians—Diligence Required.*

A street railway that employs electricity as a motive power is required to exercise the highest care to protect persons using the streets from the danger of being injured by the electric current, and is liable for any damages occasioned by its failure to do so.

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Judge.

Action by Edward Gilbert and others against the Metropolitan Street Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Miller, Buchan & Miller, for plaintiff in error.

L. W. Keplinger, C. W. Trickett, M. J. Reitz, F. D. Hutchings, and J. W. Dana, for defendants in error.

MASON, J. Edward Gilbert recovered a judgment against the Metropolitan Street Railway Company on account of injuries received by him through coming in contact with the end of a broken telegraph or telephone wire which had fallen to the ground upon a public street and had become charged with electricity by contact with the wire of the railway company. The company brings this proceeding to reverse the judgment. Only one question is presented—whether it was error for the trial court to charge the jury that the defendant was bound to use the highest degree of care to

*See *Neal v. Wilmington & N. C. Electric Ry. Co. (Del.)*, 5. R. R. R. 386, 28 Am. & Eng. R. Cas., N. S., 386; foot-note appended to *Read v. City & Suburban Ry. Co. (Ga.)*, 3 R. R. R. 278, 26 Am. & Eng. R. Cas., N. S., 278.

avoid injuries to persons using the streets, and to discover and remedy the dangerous condition arising from the falling of the foreign wire across its own. Plaintiff in error contends that it should have been held to the exercise of only ordinary diligence.

Although it is everywhere recognized that it is the duty of users of electricity to employ a high degree of diligence to prevent its causing injury to others, in many cases this principle is treated merely as an application of the general rule, and is expressed by the formula that ordinary care is required, proportioned to the danger to be guarded against.

But the peculiar conditions involved in cases of injuries by electricity have given rise to a special doctrine, somewhat analogous to that requiring operators of railways to use all possible skill and care for the protection of passengers. *Topeka City Ry. Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754. In *Thompson on Law of Electricity* it is said (section 65): "It may be doubted whether persons or corporations employing for their own private advantage so dangerous an agency as electricity ought not to be regarded as quasi insurers, as toward third persons, against any injurious consequences which may flow from it. It may be doubted whether one who collects, or rather creates, so dangerous an agency on his own land, ought not to be held to the obligation of restraining it—that is, of insulating it—at his own peril." The reasoning thus suggested was employed in an English case (*National Telephone Company v. Baker*, L. R. 1893, 2 Ch. Div. 186, 201) in support of a ruling that an electric railway company might be liable for damage caused by an electric current which it had created, irrespective of any question of negligence. No court in this country seems to have gone so far as this, but the requirement of the use of extraordinary care has been generally approved when it has been the subject of discussion. In *Crosswell on the Law Relating to Electricity* the rule derived from the American cases is thus stated (section 234): "If but little danger is incurred—as, for instance, when the wires carry only a harmless electric current; such, for instance, as the telegraph or telephone current—only ordinary care may be required; while if the wires carry a strong and dangerous current of electricity, so that negligence will be likely to result in serious accidents, and perhaps death, or if a harmless wire is in dangerous proximity to a high-tension wire, a very high degree of care, indeed—the highest that human prudence is equal to—is necessary. This is particularly true of electric light and electric railway wires, which carry a high-tension current often of great danger." A few quotations will serve to illustrate the extent to which the rule is carried, and the reasoning by which it is supported: "It is due to the citizen that electric companies that are permitted to use for their own purposes the streets of a city or town shall be

required to exercise the utmost degree of care in the construction, inspection, and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances. The danger is great, and care and watchfulness must be commensurate to it. Passengers on railroad trains have a right to expect and require the exercise by the carrier of the utmost care, so far as human skill and foresight can go, for the reason that a neglect of duty in such case is likely to result in great bodily harm, and sometimes death, to those who are compelled to use that means of conveyance. 'As the result of the least negligence may be of so fatal a nature, the duty of vigilance on the part of the carrier requires the exercise of that amount of care and skill in order to prevent accidents.' Ray on Negligence of Imposed Duties, 53. All the reasons that support the rigid enforcement of this rigid rule against the carrier of passengers by steam apply with double force to those who are allowed to place above the streets of a city wires charged with a deadly current of electricity, or liable to become so charged. The requirement does not carry with it too heavy a burden. Human skill can easily place wires and poles so that they will not break and fall, unless subjected to some strain that could not be anticipated; and it can as readily prevent the possibility, under ordinary circumstances, of the contact of wires that should not be allowed to touch one another." Haynes v. Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786. "Public policy, from sheer necessity, must require of a person or corporation using the current of electricity in high tension along highways a very high, if not the highest, degree of care." Snyder v. Wheeling Electrical Co., 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922. "Very great care might be sufficient as to the wires at points remote from public pass-ways, buildings, or places where persons need not go for work or business; but the rule should be different as to points where people have the right to go for work, business, or pleasure. At the latter points or places the insulation or protection should be made perfect, and the utmost care used to keep it so." McLaughlin v. Louisville Electric Light Co., 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812. "The business of supplying electricity to the residents of a city is so fraught with peril to the public that the highest degree of care which skill and foresight can attain, consistent with the practical conduct of the business under the known methods and present state of its particular art, is demanded." Denver Electric Co. v. Lawrence, 31 Colo. 301 (4th par. syllabus), 73 Pac. 39. "Wires charged with an electric current may be harmless, or they may be in the highest degree dangerous. The difference in this respect is not apparent to ordinary observation, and the public, therefore, while presumed to know that danger may be present, are not bound to know its degree in any.

Alabama & V. R. Co. v. Boyles

particular case. The company, however, which uses such a dangerous agent, is bound not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to every one who may be lawfully in proximity to its wires, and liable to come, accidentally or otherwise, in contact with them." *Fitzgerald v. Edison Electric Illuminating Co.*, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732. "Electric companies, of course, are not bound to have perfect apparatus or perfect construction, but they are required to exercise a degree of care and prudence in the construction and maintenance of their wires commensurate with the danger; and where their wires are designed to carry a strong and powerful current of electricity, so that persons coming in contact with them are certain to be seriously injured, if not killed, the law imposes upon the company the duty of exercising the utmost care and prudence to prevent such injury." *Perham v. Portland General Electric Co. (Or.)* 53 Pac. 14, 40 L. R. A. 799, 72 Am. St. Rep. 730. See, also, *Thomas v. Wheeling Electrical Co. (W. Va.)* 46 S. E. 217; *Daltry v. Media Electric L. H. & P. Co. (Pa.)* 57 Atl. 833; *Geismann v. Missouri Edison Electric Co. (Mo. Sup.)* 73 S. W. 654; *Harter v. Colfax Electric Light & Power Co. (Iowa)* 100 N. W. 508; 18 Cent. Dig. column 603; 10 A. & E. Enc. of L. (2d Ed.) 887. In the cases in which it is stated or assumed that a liability for damages occasioned by electricity arises only from the failure to exercise ordinary care, no consideration appears to have been given to the distinction noted, based upon its peculiar nature. The distinction is equally well grounded in reason and authority. The course of the trial court in recognizing it is approved.

The judgment is affirmed. All the Justices concurring.

ALABAMA & V. R. CO. v. BOYLES.

(Supreme Court of Mississippi, Dec. 5, 1904.)

[37 So. Rep. 498.]

Railroads—Killing Live Stock—Negligence—Evidence—Instruction.*

In an action against a railroad for killing stock, it appeared that plaintiff found his stock dead and mangled on the defendant's right of way near a stock gap. Neither the plaintiff nor any of his witnesses saw the killing. The track was straight for a half or quarter of a mile where the stock were found, and there were tracks that indicated they had run down the railroad along the ends of the ties for 40 or 50 yards. The defendant's engineer testified that the train was a local passenger train of five coaches, well equipped in every way; that the coaches and engine were of standard pattern, and fully as good as the average passenger trains run in this country; that the brakes were of the latest improved make, and in perfect working condition; that the train was running 40 or 45 miles an hour down grade; that he saw the stock 800

*See monograph appended to *Macon & B. R. Co. v. Revis (Ga.)*, 12 R. R. R. 787, 35 Am. & Eng. R. Cas., N. S., 787.

Alabama & V. R. Co. v. Boyles

or 1,000 feet away, and they were on the edge of the right of way, 50 feet from the track, with their heads turned from the track; that there was no indication of their running on the track until the engine got within 300 feet of them, when they became frightened, turned, and started on a run for the track; that before they turned they were grazing; that as soon as they started towards the track he immediately put on the brakes, and did all he could to stop the train, but could not do so in time to prevent striking them; that with a train of that character, running at that rate of speed, it could not be stopped in less than 1,300 or 1,400 feet; and that he could not have prevented the killing of the stock: *held*, sufficient to require a peremptory charge for defendant.

Appeal from Circuit Court, Scott County; J. R. Enochs, Judge.

Action by J. R. Boyles against the Alabama & Vicksburg Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Appellee, Boyles, brought this suit against appellant to recover damages for the killing of his mare and colt, valued at \$175. There were verdict and judgment in the circuit court for plaintiff, from which defendant appeals. The evidence was, in substance, as follows: Plaintiff found his animals dead and mangled on the defendant's right of way, near a stock gap. Neither the plaintiff nor any of his witnesses saw the killing. The track was straight for a half or quarter of a mile where the stock were found, and there were tracks of the animals that indicated that they had run down the track, alongside the ends of the cross-ties, for 40 or 50 yards. The defendant introduced the engineer who was in charge of the train that killed the stock, who testified that the train was a local passenger train, of five coaches, and was well equipped in every way; that both train and engine were of standard pattern, in first-class condition, and fully as good as the average passenger trains run in this country; that the brakes were of the latest improved make, and in perfect working condition; that the train was running 40 or 45 miles an hour down grade; that he saw the mare and colt 800 or 1,000 feet away, and they were on the edge of the right of way, 50 feet from the track, with their heads turned from the track; that there was no indication of their running upon the track until the engine got within 300 feet of them, when they became frightened, turned, and started on a run for the track; that before that they were grazing, and there was no indication that they would get on the track; that as soon as they started towards the track he immediately put on the brakes, and did all he could to stop the train and prevent striking them, but could not do so; that with a train of that character, running at that rate of speed, it could not be stopped in less than 1,300 or 1,400 feet; and that he could not possibly have prevented the killing of the stock. Defendant asked for a peremptory instruction to find for it. This was refused.

J. H. Thompson, for appellant.

A. W. Cooper, for appellee.

Kansas City-Leavenworth R. Co. v. Langley

TRULY, J. Under the undisputed facts in this record, appellant was entitled to a peremptory charge. This case is controlled in principle by Railroad Company v. Walker, 63 Miss. 13.

Reversed and remanded.

KANSAS CITY-LEAVENWORTH R. CO. v. LANGLEY.

(Supreme Court of Kansas, Dec. 1, 1904.)

[78 Pac. Rep. 858.]

Appeal—Case-Made.

A case-made completed within a time extended under the provisions of chapter 380, p. 583, Laws 1903, is not invalidated because the order of the judge extending the time was not filed with the clerk; the proviso requiring such filing being directory, and not mandatory.

Contributory Negligence—Endangered through Negligence—Right to Rely on Exercise of Due Care.

One placed in a position of danger by the negligence of another has a right to presume that such other will take all necessary available means to avoid inflicting injury, and, if he might reasonably suppose that no injury would be inflicted upon him by the exercise of such care, he cannot be charged with contributory negligence.

Same—Same—Failure to Exercise Best Judgment.*

One placed in a position of danger by the negligent act of another, which position requires immediate and rapid action, without time to deliberate as to the better course to pursue, is not held to the strict accountability required of one situated under more favorable circumstances. Contributory negligence is not necessarily chargeable to one upon his failure to exercise the greatest prudence, or best judgment in such a case.

Railroads—Consolidation—Liabilities.

By one of the articles of the charter whereby several railroad corporations were consolidated it was provided that such consolidation was "subject to all of the obligations and liabilities to the state which belonged to or rested upon any of such corporations making such consolidation." This assumption followed in terms the requirement of the statute: *held*, that this was an assumption of the obligations of each of the constituent corporations arising ex contractu or ex delicto.

(Syllabus by the Court.)

Error from District Court, Leavenworth County; J. H. Gillpatrick, Judge.

Action by William Langley against the Kansas City-Leavenworth Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Atwood & Hooper, for plaintiff in error.

J. C. Petherbridge and B. F. Endres, for defendant in error.

CUNNINGHAM, J. Defendant in error moves to dismiss

*See foot-note appended to St. Louis & S. F. R. Co. v. Brock (Kan.), 12 R. R. R. 613, 35 Am. & Eng. R. Cas., N. S., 613.

this proceeding for the reason that no legal case-made is attached to the petition in error. It seems that after chapter 380, p. 583, of the Laws of 1903, took effect an extension of time within which to make and serve a case-made was obtained by the plaintiff in error, but that such order was not filed with the clerk of the district court as provided in that chapter, and it is claimed that the requirement to so file is mandatory, and a failure to do so renders farther proceedings in the matter of the settlement and signing of the case-made void and ineffectual. We do not take this view. There is nothing in this act which indicates that the filing of the order is essential as a prerequisite to its becoming operative. Ordinarily, such would not be the case. Ordinarily, the paper on which the order of a court or of a judge at chambers is written need not be deposited in the clerk's office that it may become effective. It is well, as a measure of publicity and for its preservation, that it should be; but, unless it appears that such disposition is a prerequisite to its becoming efficient, the requirement that it should be so filed must be held to be directory, and not mandatory. The rule, as stated by this court in *Jones v. The State*, 1 Kan. 279, and reiterated in *State v. Yordi*, 30 Kan. 223, 2 Pac. 162, is: "Unless a fair construction of the statute shows that the Legislature intended compliance with the provisions in relation to the manner to be essential to the validity of the proceedings, it is to be regarded as directory." We do not think that it can be fairly said that this provision relative to the filing of the order of extension of time was intended to be essential to the validity of such extension. The proviso in which this requirement is embedded is merely incidental. No duty is imposed upon the party obtaining the extension to file such order. Indeed, it does not appear that the order is to come to his hands. It would seem to serve no purpose except to give notice to any one interested that the extension has been granted. We can say at least that in the absence of any showing of prejudice to the opposite party by the failure to so file the case-made is not invalidated thereby.

The action was one to recover personal damages because of an injury suffered by the defendant in error from being struck by one of the electric street cars of plaintiff in error. The defendant in error was driving south with a two-horse team upon one of the streets in Leavenworth, he had a light load, and with him was riding another man. He saw approaching him from the south two heavily loaded three-horse coal wagons. There was not room for him to pass these wagons between the east curb of the street and the railroad company's track on the west. He therefore turned to the west, and attempted to cross the track diagonally. At the same time, looking to the north, he observed a street car standing upon a passing track about 175 feet away. His horses crossed the track without accident, but as the hinder

Kansas City-Leavenworth R. Co. v. Langley

part of the wagon was crossing one of the horses fell down. Langley, on cross-examination, testified as follows: "Q. Then the situation is this: Your horse had fallen. You looked up, and saw a car coming towards you. You noticed enough to know that it was coming in your direction—to form an opinion that it was coming at the rate of from five to eight miles an hour—and that you didn't see any man on the platform, and, if he had been there, you would have seen him you think. Now have I got it right? A. I certainly would have seen him if he had been there. Q. And yet you stayed right in your wagon to pull that horse up? A. I was so confused and excited over the horse being down and trying to get him up— Q. You still stayed in the wagon? A. I did, sir. Q. So that you knew, if there wasn't any man on that front platform, there wasn't anybody at the machinery that controlled the movement of the cars, didn't you? A. Well, I didn't see any one; no, sir. Q. You said you didn't see him, and if he had been there you would have seen him. That was your statement? A. I would have seen him if he had been there, yes. Q. So that you looked, and saw no man, and saw no man at the end of the car where the machinery was that controls the movement of the car? A. No, sir; there was no man there that I could see. Q. Then, as you looked back, and took that situation in, you saw a car coming with no man in control of it, didn't you? A. At that point? Q. At that point just when you looked, after your horse had fallen? A. Yes, sir. Q. You turned your back then right on that car that was coming towards you without a man to control it, and began to haul at your horse. Is that a fact? A. I did, sir; paid no further attention to the car. Q. How far was the car away at the time you saw it coming towards you without a man in control of it, and at the point you were beginning to haul your horse up? A. Something over a block, to the best of my judgment. Q. Which is approximately 300 feet? A. Yes, sir. Q. And the next you knew was that you were on the pavement? A. When I came to myself, I was on the pavement." On direct examination Langley testified as follows: "As quick as my horse fell, I threw up my hands towards the car and hollered. Then I tried to assist my horse in getting up by bracing my foot against the dash-board of the wagon and holding a very tight rein on the horse. The horse was lunging, and making an effort to get up, and, of course, what I was doing would brace him, and help him to get up." And further as follows: "Just before I turned to drive across the track, I looked up, and the car was on the side track or switch. As I started to cross the track, I glanced over my shoulder up the street to look for the car, and saw it on the side track or switch just moving off, which was about one block away, or 300 feet. Q. You noticed there was no motorman on that front car didn't you? A. I did not."

Kansas City-Leavenworth R. Co. v. Langley

While Langley seems somewhat mixed as to whether there was a motorman in charge of the car, it is shown by the evidence of others, and specially found by the jury, that there was. The man who was riding in the wagon with Langley testified substantially as follows: "I was riding in the wagon with Langley at the time he was injured. We were driving down Fifth street, coming to Market, and just as we got to Ottawa street there was a car standing on the switch at the west side, and another car coming from the west on Ottawa. When we saw the car was going to cut us off from passing down on the west side of Fifth, we kept down on the east side of the track for some distance, when we met two three-horse wagons heavily loaded with coal. We could not get by them handy, and we attempted to cross the track to the southwest, and just as we crossed the track one of the horses slipped and fell. I jumped out of the wagon, and ran back 75 or 100 feet, throwing up both hands, and hollering and motioning for the car to stop. These coal wagons took up pretty nearly the whole of the street on that side. One of them was in the center of the street and the other kind a cornering across the street, and we saw that we would not make it there, and we had to get out of the way of the car and out of the way of the teams. We aimed to cut across the tracks and come over on the other side of the street, and the horse fell. If the horse had not fallen, we would have had ample time to get away. The horse fell just after he crossed over the track, which left the left hind wheel of the wagon standing in the center of the track. Q. Was there any bell rung as they came down that incline towards the wagon? A. No, sir. Q. I will ask you whether or not, after the car had passed you and you picked up the wreck, whether the employees in charge of the car, or any one, had used any sand in attempting to check the speed of the car? A. Not that I saw. Q. Did you notice along the rails? A. Yes, sir. Q. Would the sand, having been run over by the wheels of the car, make such an impression that you could have told whether fresh sand had been used or not? A. Yes, sir. Q. Did you see any indication of any sand having been used at that time? A. No, sir. I saw the collision. The car ran into the wagon wheels, and struck the wheels pretty near the center. It shoved the wheels around sideways and gave it a front pitch. This shoving assisted in raising the horse onto its feet and broke the neckyoke in two. The next thing I saw, Langley and the spring seat were going up in the air. He fell across the seat with his back and side and his shoulders and head in a tub of fish." Other evidence of the plaintiff showed that the track was an easy downgrade towards the south; that there was no bell sounded upon the car, nor sand used to arrest its progress, as it approached Langley's wagon; that it could have been stopped, at the rate which it was going, after the motorman might have ob-

Kansas City-Leavenworth R. Co. v. Langley

served that the horse was down, and before the car had reached the wagon. The car, however, ran into the hind end of the wagon, throwing Langley to the ground, and inflicted the injury complained of. A demurrer to plaintiff's evidence was overruled, and the case went to the jury, which found a verdict in favor of Langley.

Complaint is here made of the overruling of this demurrer; the claim being that the plaintiff was guilty of such contributory negligence as to preclude his recovery. This not because there was negligence in his endeavoring to cross the track. This, it seems, was necessary for him to do; and the testimony is that, had not his horse fallen, he would have had ample time in which to do it. But it is claimed that after the horse had fallen it was his duty, seeing, as he did, the car approaching, and having time to do so, to extricate himself from the danger, leave his wagon and horses to their fate, and thus save himself at their expense. As the plaintiff in error puts it in his brief: "A person who is in a position of danger must exercise ordinary care to extricate himself from that position, and, if he fails to do so, he cannot recover, even if the party who caused the injury is guilty of negligence." Without question, this is a correct general statement of the law, but this general statement leaves to be determined by the trier of fact what is the ordinary care required under all the circumstances of the case. We do not think, as a matter of law, the court would have been warranted, under the circumstances of this case, in saying that Langley was bound to abandon his efforts to get his horse up and his wagon out of the way of the approaching car, although he knew of the approach of the car. He is presumed also to have known, what was the fact, that it could have been stopped in time to avoid the collision, and he had a right to suppose that, seeing the inextricable position which his wagon occupied, the motorman would apply the necessary means to so stop it. His continued effort to get his horse up, and thereby get the wagon off the track, was not so obviously imprudent, if imprudent at all, as to warrant the court in declaring it to be culpable negligence.

It also appeared from the evidence that when the horse fell the man who was riding with Langley jumped out of the wagon, and ran up the track toward the approaching car some 75 or 100 feet, waving his hands and hallooing, thus giving warning to the persons in charge of the car in time to have stopped it before it struck the wagon, or at least the evidence tended in that direction; and, if the jury so found from it, it made the company most culpably, and perhaps wantonly, negligent. Certainly, in view of all this, the court ought not to have held as a matter of law by sustaining defendant's demurrer to plaintiff's evidence, that it was the duty of plaintiff to abandon his wagon and team and seek his own safety in flight.

Again, one placed in a position of danger by the negligent act of another, which position requires immediate and rapid action, without time to deliberate as to the better course to pursue, is not held to the strict accountability that is required of one situated under more favorable circumstances. Contributory negligence is not necessarily chargeable to one upon his failure to exercise the greatest prudence or best judgment in cases where one is required to act suddenly or in an emergency. *Valin v. Milwaukee, etc., R. Co.*, 82 Wis. 1, 51 N. W. 1084, 33 Am. St. Rep. 17; *Consolidated Traction Co. v. Scott*, 58 N. J. Law, 682, 34 Atl. 1094, 33 L. R. A. 122, 55 Am. St. Rep. 620; *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85. In *Shearman & Redfield on Negligence* (5th Ed.) vol. 1, § 89, the rule is stated as follows: "In judging of the care exercised by the plaintiff, reasonable allowance is always made for the circumstances of the case; and, if plaintiff is suddenly put into peril without having sufficient time to consider all of the circumstances, he is excused for omitting some precautions, or making an unwise choice under this disturbing influence, although, if his mind has been clear, he ought to have done otherwise." The same rule is well stated in *Edgerton v. O'Neil*, 4 Kan. App. 73, 46 Pac. 206, as follows: "Where one acts erroneously through fright or excitement, induced by another's negligence, or adopts a perilous alternative in the endeavor to avoid an injury threatened by such negligence, or when he acts mistakenly in endeavoring to avoid an unexpected danger negligently caused by the defendant, he is not guilty of contributory negligence as a matter of law." Many authorities to this effect might be cited. The court submitted the question of contributory negligence, under proper instructions, to the jury, and in this was clearly correct.

The action was originally brought against the Leavenworth Electric Railroad Company. While it was pending this company was consolidated with others, and the consolidated company took the name of the present plaintiff in error, the Kansas City-Leavenworth Railroad Company. In due time the action was revived in the name of this consolidated company, and prosecuted to judgment against it. In the charter of consolidation it was provided in article 1 that the new company "shall own and control the connected lines of railroads of said several corporations with all the rights, powers, privileges and immunities and subject to all of the obligations and liabilities to the state, which belong to or rested upon any of such corporations making such consolidation." Article 10 is: "The contract obligations of each of said constituent companies shall be and are hereby assumed by said consolidated company." The plaintiff in error here contends that the effect of these two provisions is to exclude all obligations of the individual constituent companies not aris-

Kansas City-Leavenworth R. Co. v. Langley

ing upon contract. That the specific assumption found in article 10 of contract liabilities, only, by necessary implication, under the rule, "*expressio unius est exclusio alterius*," excludes the assumption of liability arising upon tort, and hence that the judgment in this case against the new company was not warranted. In support of this it cites *Berry v. K. C., F. S. & M. R. R. Co.*, 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371, where it is held that, in the absence of stipulations to the contrary, the consolidated company is answerable for all of the obligations of the constituent companies, including those arising upon tort. It therefore argues *per contra* that, inasmuch as here is a stipulation in article 10 assuming only contract obligations, this amounts to a stipulation excluding obligations upon tort. This might be quite cogent argument in the absence of general law upon the subject or other provisions in the article of consolidation. In the very able and exhaustive article upon corporations by Judge Thompson found in 10 Cyc. 303, the general rule, in the absence of statutory or contractual agreements found in articles of consolidation, is stated to be as follows: "As a general rule, the new company succeeds to the rights, duties, obligations, and liabilities of each of the precedent companies, whether arising *ex contractu* or *ex delicto*." This rule is well supported by the citations there found as well as by the text-writers. Field on Corporations, § 435; 3 Wood's Railway Law, p. 1680, § 486; Morawetz on Corporations, §§ 809, 955, 956. But, more than this, the first section of the charter of the consolidated companies, as above quoted, following the language of the statute which authorizes such consolidation (section 5870, Gen. St. 1901), provides that the consolidated company is subject to all of the obligations and liabilities to the state which belong to or rested upon any of the constituent corporations. This language, as construed by Chief Justice Horton in *Berry v. K. C., F. S. & M. R. R. Co.*, 52 Kan. 770, 34 Pac. 805, 39 Am. St. Rep. 371, embraces obligations and demands arising out of tort as well as out of contract; the interpretation being that the assumption is of all obligations, and also of all liabilities to the state, which belonged to or rested upon the constituent companies. The argument used in the *Berry Case* in arriving at this conclusion is lucid and cogent, and cannot be added to. We hold that not only did the statute under which the consolidation in question was effected require the assumption of all obligations—those arising upon tort as well as those arising upon contract—but that the charter itself, following the language of the statute, imposed the payment of such obligations upon the consolidated company.

We find no error in the record; hence affirm the judgment of the court below. All the Justices concurring.

only vehicles he saw on Commerce street; that, just after his way was blocked by the dray, the edge of the box car struck him; that he saw a man on the north end of the car, but did not hear him halloo until after he was struck; that the end of the box car struck his road cart and dragged him several feet; that his road cart was destroyed; and that he was hurt," etc. Defendant's evidence on this subject consisted of the testimony of witnesses to effect that there were seven or eight cars in the train being pushed by an engine at the south end, and that there was a flagman on the running board of the car at the north end of the train, and a brakeman on top of the third car from that end. The flagman testified, in substance, that he saw plaintiff driving on the track as he left Government street; that he was coming in a brisk trot down the middle of the track towards the train; that there were no vehicles on Commerce street, except where the injury occurred, and plaintiff had plenty of time to get off the track before reaching that point, and could have gone off at that point by driving a step nearer the sidewalk; that, as soon as he (the witness) saw plaintiff was in danger of not getting off the track in ample time, he halloosed to plaintiff several times, and signaled the engineer to stop the train, and it was immediately stopped as quickly as it could be done; that he (the witness) had given the slow-down signal just as his car crossed Church street, while plaintiff was 90 feet away; and that the train was moving only 3 or 4 miles an hour at the time he gave the signal to stop, and ran 10 or 12 feet after striking him. The brakeman testified in part as the flagman had done, and, in addition, that as his car was crossing Church street he saw plaintiff coming down the track at a brisk trot, and signaled the engineer to slacken the speed of the train, which was then from 6 to 8 miles per hour, and the speed was immediately checked to about 3 or 4 miles per hour, and that when plaintiff was 45 or 50 feet of the train he turned to the west, and had room to drive off the track, and had, when struck, cleared the track, except one wheel of his vehicle; that no effort was made to stop the train until just before plaintiff reached that part of the street which was crowded with vehicles, and up to this time he (the witness) had supposed plaintiff would pull off the track in time to escape injury. There was other testimony, but in it there was nothing affecting the question of negligence vel non on the part of the train crew materially different from what is above stated.

We are of opinion that in the evidence there is nothing from which negligence can be imputed to the defendant, and that therefore, and apart from any consideration of the question of contributory negligence, the general affirmative charge requested by defendant should have been given. No statute, and, so far as the evidence shows, no ordinance of the city, was violated by the mere act of backing the train in the

Bottoms v. Seaboard Air Line Ry

street, or by any act or omission of defendant's servants in respect of speed of moving, the keeping of a lookout, or the giving of signals, or in other respect; nor from the evidence can it be reasonably inferred that the conduct of the servants was violative of any rule of prudence enjoined on them by the common law. Though they knew of the presence of the plaintiff on the track, they were not bound to use efforts to stop the train until it became reasonably apparent that plaintiff would not drive clear of the cars, for until that time they had a right to assume that he was possessed of the ordinary faculties of sight, and that, in the exercise of those faculties, he would leave the track before encountering danger. *Glass v. M. & C. R. Co.*, 94 Ala. 581, 10 South. 215; *Burson v. L. & N. R. Co.*, 116 Ala. 198, 22 South. 457; *Erickson v. St. Paul & D. R. Co.*, 41 Minn. 500, 43 N. W. 332, 5 L. R. A. 786.

There is not in the evidence anything to show that the plaintiff lacked opportunity to see the train, or to avoid the same, if he had made timely effort to do so; nor is there evidence that on the part of defendant's servants there was any lack of diligence about discovering plaintiff's peril, or about stopping the train after they discovered it, or that defendant was in any way responsible for the obstruction of plaintiff's exit from the track, caused by the turning of the dray from Church into Commerce street. Plaintiff was not entitled to recover without proof that his injury was the proximate result of negligence chargeable to the defendant, and the accident was not of such character as that proof merely of its happening could afford an inference of such negligence.

Reversed and remanded.

BOTTOMS et al. v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina, Sept. 13, 1904.)

[49 S. E. Rep. 348.]

Spark Arresters—Duty of Railroad.*

It is not the duty of a railroad company to equip its engines with the "best approved" spark arresters, but merely with such as are in general use.

Same—Same—Instruction—Error Not Cured.

Error in charging that it was defendant's duty to equip its engines with the "best approved" spark arresters was not rendered harmless by uncontradicted evidence that the engine claimed to have set the fire was equipped with the best approved spark arrester; this fact not being expressly admitted, and there being evidence that a shower of large sparks was emitted.

Appeal from Superior Court, Northampton County; Cooke, Judge.

*See foot-note appended to *Anderson v. Oregon R. Co. (Ore.)*, 12 R. R. 625, 35 Am. & Eng. R. Cas., N. S., 625.

Bottoms v. Seaboard Air Line Ry

Action by J. D. Bottoms and others against the Seaboard Air Line Railway. From a judgment for plaintiffs, defendant appeals. Reversed.

T. W. Mason, Day & Bell, and Murray Allen, for appellant.
Peebles & Harris and Gay & Midyette, for appellees.

CLARK, C. J. In this action for damages for destruction of the plaintiffs' store, alleged to have been set on fire by sparks from the defendant's engine, the court charged the jury that it was "the duty of railroad companies to equip their engines with the best approved devices and appliances for arresting sparks, * * *" and that failure to do so was negligence, making the defendant liable for damages if the jury should find that the plaintiffs' house was set on fire by sparks from the defendant's engine. The defendant excepted.

There is error. In *Witsell v. Railroad*, 120 N. C. 557, 27 S. E. 125, this court said that it was not negligence to fail to adopt improved appliances merely because they are "known" and "approved"; that railroads were not to be held to so strict a rule that they must keep a lookout for improvements and inventions and buy all such as were approved; and held the correct rule to be thus: "It is negligence not to adopt and use all approved appliances which are in general use." It added that to require the purchase of approved appliances before they had come into general use would be simply to hold that every railroad must have "the latest and best," which would be an unreasonable burden. This ruling has been uniformly followed since. In *Greenlee v. Railroad*, 122 N. C. 979, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, and *Troxler v. Railroad*, 124 N. C. 191, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580, the court cites with approval from *Witsell v. Railroad*, *supra*, that it was "not negligence to fail to provide the latest improved appliances," and that "a railroad company is liable for any injury caused by failure to use approved appliances in general use." The same language is again quoted and approved in *Lloyd v. Hanes*, 126 N. C. 364, 35 S. E. 611; *Dorsett v. Mfg. Co.*, 131 N. C. 262, 42 S. E. 612, and other cases, and repeated as recently as *Marks v. Cotton Mills*, 135 N. C. 290, 47 S. E. 432. The rule laid down in *Aycock v. Railroad*, 89 N. C. 326, is "usual and proper appliances" to prevent injury by escaping sparks. This is about the same ruling as in *Witsell v. Railroad*, in somewhat different language.

The learned counsel for the plaintiffs contends that the defendant's witness testified that the engine had the best approved spark arrester, and no witness testified to the contrary; hence, as the charge must be read in connection with the evidence, the error, being as to a matter not in controversy, was harmless; and that the real point in this part of the charge was as to the continued keeping of the spark

Indianapolis St. Ry. Co. v. Johnson

arrester in good condition, as to which the court charged correctly, and not as to the nature of the spark arrester, which was not denied to be the "best approved." But Mr. Allen, of counsel for the defendant, pointed out that, while no witness directly testified to the contrary, it was not admitted that it was a proper spark arrester. The plaintiffs' evidence of a shower of large sparks coming from the engine, if believed, tended to question the defendant's evidence of the spark arrester being the "best approved" pattern, fully as much as it tended to controvert the evidence of its being kept in order.

Error.

INDIANAPOLIS ST. RY. CO. v. JOHNSON.

(Supreme Court of Indiana, Nov. 29, 1904.)

[72 N. E. Rep. 571.]

Special Findings—General Verdict—Presumptions.

In determining whether special findings are in irreconcilable conflict with the general verdict, all reasonable presumptions and intentions must be indulged in favor of the verdict, and nothing can be presumed in favor of the special findings or answers to interrogatories.

Accident on Street Railway Track—Contributory Negligence—Wife in Vehicle Driven by Husband—Special Findings—General Verdict.

Where plaintiff was injured by a street car striking a vehicle in which she was riding with her husband, special findings of isolated facts to the effect that plaintiff, while passing along the street prior to the accident, did not look to discover the approach of the car; that she made no effort to ascertain the location of the car; that she heard it approaching, and gave her husband some warning that they were in danger, etc.—were insufficient to overthrow a general verdict in favor of plaintiff, as showing that she was guilty of contributory negligence as a matter of law.

Same—Same—Same—Question for Jury.

In an action for injuries to plaintiff in a collision between a street car and a vehicle in which she was riding, evidence *held* to require submission of plaintiff's alleged contributory negligence to the jury.

Preponderance of Evidence.

The preponderance of the evidence does not depend on the number of witnesses, but means the greater weight of the evidence.

Same—Contributory Negligence—Instructions.

The use of the words "shall" and "should," in an instruction that, if the jury shall find from the preponderance of all the evidence that plaintiff acted as a person of ordinary prudence under all the circumstances, they should find her free from contributory negligence, did not render such instruction erroneous.

Accident on Street Railway Track—Contributory Negligence—Wife in Vehicle Driven by Husband—Instructions.

Where the jury had been instructed that they should consider all the circumstances and surroundings at the time of the injury in determining whether plaintiff was guilty of negligence which contributed to her injury, and were fully and correctly charged as to imputed negligence, an instruction that, on the question of plaintiff's contributory negligence, the jury should consider not only her own acts and conduct, but all other circumstances surrounding the accident, and determine from these whether plaintiff was free from contributory negligence, and if she was herself free from such negligence, and was merely a passive

Indianapolis St. Ry. Co. v. Johnson

guest of her husband, without any authority to control his conduct or movements in driving and managing the horse and vehicle in which she was riding at the time, his negligence, if any, could not be imputed to her, was not objectionable as invading the province of the jury, and misleading them to believe that in considering plaintiff's contributory negligence they were not to consider the negligence of her husband.

Same—Imputed Negligence—Wife in Vehicle Driven by Husband.*

Where, at the time plaintiff was injured, she did not in any manner undertake to exercise reasonable care for her safety through the agency of her husband, who was driving and managing the vehicle in which plaintiff was riding at the time, the negligence of the husband in failing to look out for an approaching street car, etc., by which plaintiff was injured, could not be imputed to her.

Witnesses—Credibility—Province of Jury—Instructions.

An instruction that the jury were the exclusive judges of the credibility of the witnesses, and that it was their duty to reconcile, so far as they could, conflicting evidence, etc., was not objectionable as confining the jury to the consideration of the interest and character of such witnesses whose evidence was conflicting.

Instructions.

Failure of the court to charge with sufficient fullness on particular issues is unobjectionable, where no further instructions were requested.

Appeal from Circuit Court, Boone County; Samuel R. Artman, Judge.

Action by Mary E. Johnson against the Indianapolis Street Railway Company. A judgment was rendered in favor of plaintiff, and defendant appealed to the Appellate Court, by which the case was transferred to the Supreme Court, as authorized by Burns' Ann. St. 1901, § 1337. Affirmed.

F. Winter, W. H. Latta, and S. M. Ralston, for appellant.

W. J. Beckett, for appellee.

JORDAN, J. The complaint in this action upon which a recovery below was had alleges, among others, the following facts: On October 5, 1901, plaintiff was riding in a buggy with her husband, who was driving the horse attached to said vehicle. She had no control of the horse, and did not attempt in any way to direct her husband how he should drive the buggy or where he should drive, or in what manner he should manage and control the horse. She was merely a passive guest of her husband while riding in the buggy. The defendant's double line of tracks of street railway which it was operating in the city of Indianapolis extends east and west on Market street, running past and in front of the market house, commonly known as "Tomlinson Hall." At the time in question, which was Saturday night of the day aforesaid mentioned, there were horses and vehicles along said market place which were backed down to the curb on both sides of the defendant's double tracks, leaving a passageway on East Market street from Delaware to Alabama street, which way consisted of defendant's tracks, for the reason

*See foot-note appended to Duval v. Atlantic Coast Line R. Co. (N. Car.), 11 R. R. R. 235, 34 Am. & Eng. R. Cas., N. S., 235.

Indianapolis St. Ry. Co. v. Johnson

that all of the space on either side of the tracks in said street was occupied by vehicles and horses down to the curb, as hereinbefore stated. The condition of the street at the time of the accident was well known to the defendant and its servants and employees in charge of its cars running east and west on said Market street in front of said hall. The only part of the roadway left unoccupied in said street for the passage of horses and vehicles was the part occupied by the defendant's south track in passing east, and upon the north track in passing west. Vehicles were driven through said Market street and placed east upon the south track of the defendant's tracks, and west upon the north track, and all of these facts were well known to defendant at the time of the accident. Plaintiff's husband desired to pass in and through said Market street from Delaware Street East to Alabama street, and for that purpose he turned on defendant's south track at Delaware street, at which time plaintiff looked west on Market street for a street car, but neither saw nor heard one approaching on said south track. Her husband then turned the vehicle in which she was riding east upon said south track, and drove east thereon about one-half square, and while thus driving on said track one of defendant's cars, in charge of its servants in the line of their employment, negligently approached from the rear the buggy in which plaintiff was riding. The motorman and servants of the defendant in charge of said car could see and did see the buggy in which plaintiff was seated, which was then upon the track in front of said car. That said motorman could see and did see and know that neither plaintiff nor her husband could drive the horse and vehicle off said track by reason of the condition of the street as hereinbefore described. That the motorman could see and did see the perilous position and condition in which the plaintiff was placed upon said track, and could, in the exercise of ordinary care, have stopped said car and checked the speed thereof, and thereby avoided inflicting any injury upon plaintiff. But the pleading charges that, when the plaintiff was in the position of peril upon said track as aforesaid stated, the defendant's servant and motorman in charge of said car negligently ran it upon said track towards said vehicle, and negligently ran against said vehicle, striking it in the rear, thereby negligently overturning it, throwing the plaintiff therefrom onto the street, under said vehicle, thereby negligently and seriously injuring her about the head, body, back, and limbs, etc. A demurrer to the complaint was overruled by the lower court, and the cause was put at issue by appellant's filing an answer of general denial. The venue of the cause was changed to the Boone circuit court, wherein a trial by jury resulted in a general verdict being returned in favor of appellee. Along with its verdict the jury returned answers to a series of interrogatories. Appellant unsuccessfully moved for judgment

in its favor on the answers of the jury to the interrogatories. Its motion for a new trial was denied, and judgment was rendered in favor of appellee upon the verdict of the jury. Appellant appeals, and assigns as error (1) that the court erred in overruling the demurrer to the complaint; (2) overruling its motion for judgment on the answers to the interrogatories; (3) in overruling its motion for a new trial.

The first error assigned is not argued by appellant, and consequently must be considered as waived.

Appellant's counsel argue that the answers of the jury to the interrogatories conclusively disclose that appellee was guilty of negligence which contributed to the injury she sustained. These answers in part show that, at the time of the accident in controversy appellee and her husband were driving in a buggy along Market street in the city of Indianapolis. They turned onto Market street from Delaware street, and were driving eastward on the latter street on and along the south track of appellant's railway, and at the time of the accident had reached a point on Market street about 75 feet from Alabama street. The car which collided with the buggy and turned it over, thereby injuring appellee, was running towards the east on said street, in the rear of plaintiff's buggy. It appears that neither she nor her husband looked to the rear to see how near the car was in the rear of the buggy. The motorman in charge of the car sounded the gong when he discovered a boy with a wheel on the track. On account of the boy being on the track, the car, it appears, stopped to let him get off, and at the time it stopped for this purpose the distance intervening between the front of the car and the buggy in which the plaintiff was seated was 12 feet. The jury find that after the boy got out of the way the car ran about 20 feet before it collided with the buggy. As the plaintiff and her husband were traveling towards the east along Market street, the jury find that she heard the car approaching in the rear. At the time of the accident the buggy was moving along the street towards the east with its two north wheels between the rails of the track on which the car was running. The jury further find that the appellee, while she and her husband were traveling from Delaware street to where the collision occurred, warned her husband of the danger they were in by reason of the car approaching their buggy in the rear. After turning into Market street from Delaware street, the plaintiff made no effort to ascertain the location and whereabouts of the car that came up from the rear. From these facts alone appellant's counsel contend that it appears that appellee did not exercise such care as the law exacts. An examination of the special findings, in part and as a whole, discloses no such irreconcilable conflict between them and the general verdict as would entitle appellant, over the general verdict, to a judgment in its favor. The rule is one well settled that all reasonable presumptions

and intendments must be indulged by the court in favor of the general verdict, and nothing can be presumed in favor of the special findings or answers to interrogatories. The reason for this rule has been repeatedly given in the decisions of this court. Under the general verdict the jury is required to find upon all of the issuable facts proven in the case, while the court, in testing the force of isolated facts as disclosed by the special findings, is not in a position to know, and consequently is not advised, what other facts bearing on the same matter or question were considered by the jury in arriving at the general verdict. The force and effect of the general verdict in this case compels the court to assume that the jury found under the evidence that the plaintiff was not guilty of contributory negligence. *Southern Ind. R. Co. v. Peyton*, 157 Ind. 690, 697, 61 N. E. 722, and cases there cited.

A motion for judgment on the special findings and answers to interrogatories is properly denied, unless the antagonism between such findings and the general verdict is beyond the possibility of being removed or reconciled by any evidence legitimately admissible under the issues in the case. *McCoy v. Kokomo, etc., R. Co.*, 158 Ind. 662, 64 N. E. 92, and cases cited.

The mere isolated facts as shown by the special findings, viz., that appellee, while passing along the street prior to the accident, did not look to the rear to discover whether a car was approaching from that direction; that she made no effort, after the vehicle in which she was riding turned onto Market street, to ascertain the location of the car coming from the west; that she heard it approaching, and gave her husband some warning to the effect that they were in danger by reason of its approach towards them from the rear—are in the main, as contended by counsel, sufficient to overthrow the general verdict. It may be asserted, however, that there is nothing in the special findings to advise the court of the particular surroundings of the appellee and her husband immediately at and prior to the collision in question. No facts are found disclosing the speed at which the car in question was running at the time. Appellee and her husband were driving towards the east on the south side of Market street, which apparently was the proper side. There is no finding to show that appellee or her husband could have removed the buggy from the south track upon which they were driving to the north track, even if under the circumstances it had been right for them to have done so. Under the facts alleged in the complaint, and impliedly found in the general verdict in favor of appellee, the jury may be said to have found that the vehicle in which appellee was riding at the time of the accident was required, when going east on Market street, to keep on the south side thereof, and that this fact was known to appellant and its motorman in charge of the car. Certainly we cannot adjudge as a matter of law, under the mere

facts disclosed by the special findings, that appellee was guilty of negligence at the time of the accident in question which contributed to her injuries. The question in regard to her contributory negligence under the evidence in this case was one of fact for the determination of the jury from all of the evidence and circumstances in the case touching or bearing thereon, and, as previously said, the jurors by their general verdict have found that fact in favor of appellee, and, as there is nothing in the special findings when tested by the rule asserted which would warrant the overthrow of the general verdict, appellant's motion, therefore, for judgment in its favor was properly denied. *Citizens' St. Ry. Co. v. Damm*, 25 Ind. App. 511, 58 N. E. 564; *Indianapolis St. Ry. Co. v. Darnell* (Ind. App.) 68 N. E. 609.

The court gave to the jury what apparently is a carefully prepared charge, but certain parts thereof are criticised by counsel for appellant. By the third instruction the jury was advised that, in order to entitle the plaintiff to recover, she must prove by a preponderance of all of the evidence all the material allegations contained in the complaint. Immediately following this statement, the court, in the same instruction, stated to the jury that: "*The preponderance of evidence does not depend upon the number of witnesses, and does not mean the greater number of witnesses. It does depend upon the weight of the evidence, and means the greater weight of the evidence.*" (Our italics.) Appellant criticises that part italicized, for the reason asserted that it does not state the law correctly, and was an invasion of the province of the jury. They assert that, where the witnesses are equally credible in respect to their character, the preponderance of the evidence does depend upon the number of witnesses, and that the preponderance thereof is necessarily determined by the greater number of witnesses. As a general rule, the preponderance of the evidence in a case does not depend upon or mean the greater number of witnesses testifying upon the matter or matters in issue. Counsel mistake the law in their contention that, where the witnesses in a case are equally credible in respect to their character, then in such a case the preponderance of the evidence depends upon the number of witnesses testifying. This certainly is not the true test in any case. Any number of witnesses may be of equal credibility and possess equal informatoin, and still differ greatly in the amount or weight of their evidence. The authorities generally affirm that the number of witnesses are not to be counted by the jury or court trying the case in order to determine upon which side is the preponderance, but the evidence given by them is to be weighed, and the preponderance thereof does not depend on the greater number of the witnesses in the particular case. *Wray, Adm'r, v. Tindall*, 45 Ind. 517; *Howlett v. Dilts*, 4 Ind. App. 23, 30 N. E. 313; *Bierbach v. Goodyear*,

etc., Co., 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19; *Ennis v. Dudley* (City Ct. N. Y.) 48 N. Y. Supp. 622; 3 Jones on Evidence, § 902; *Savannah, etc., R. Co. v. Wideman*, 99 Ga. 245, 25 S. E. 400; *Village of N. Alton v. Dorsett*, 59 Ill. App. 612; *Bishop v. Busse*, 69 Ill. 403. In *Bouvier's Law Dict.* vol. 2, p. 730, preponderance of evidence is defined to be "the greater weight of evidence, or evidence which is more credible and convincing to the mind." Citing *Button v. Metcalf*, 80 Wis. 193, 49 N. W. 809. The instruction in question is not open to the objections urged by counsel for appellant. If not as full and explicit under the circumstances as desired, they should have tendered and requested an instruction expressing their views of the law on the question involved.

The fourteenth instruction given by the court is as follows: "In determining whether or not the plaintiff in this case was guilty of contributory negligence, you shall consider her own acts and conduct, and all the other circumstances shown in evidence surrounding the accident and injury, if any, to the plaintiff. And, if you shall find from the preponderance of all the evidence that the plaintiff acted as a person of ordinary prudence under all the circumstances, you should find her free from contributory negligence, although you may find that her husband was guilty of negligence in the driving and management of his horse and vehicle. In other words, no negligence of the husband in the driving and management of said horse can be imputed to the plaintiff, if you find that she herself was free from any fault or negligence, and was merely the passive guest of her husband, without any authority to direct or control the conduct or movements of her said husband in the driving and management of said horse." It is insisted that this charge is bad, for the reason that it invades the province of the jury in stating to them that they shall consider the conduct of the plaintiff and other circumstances, etc.; the further contention being that by this statement of the court the question of plaintiff's contributory negligence was to be considered alone, to the exclusion of the negligence on the part of her husband. It is insisted that the jury must have understood by the charge that the fact that plaintiff was merely a passive guest of her husband was equivalent to establishing her freedom from fault or negligence. It is further contended that it was not proper for the court to use the words "shall" and "should" as they are employed in the instruction. That the charge is not rendered bad for the latter reason is fully settled by the decision of this court in *Strebin v. Lavengood*, 71 N. E. 494, and cases there cited.

It will be observed that by the instruction in controversy the jury was advised that on the question of plaintiff's contributory negligence they should take into consideration not only her own acts and conduct, but all other circumstances surrounding the accident. From a consideration of all of the

facts the jury was informed that they should determine, under all of the circumstances, whether the plaintiff was free from contributory negligence. The charge further stated that if the plaintiff herself was free from such negligence, and was merely the passive guest of her husband, without any authority to control his conduct or movements in driving and managing the horse and vehicle, then under such circumstances the negligence of her husband could not be imputed to her.

The court, in the 10th, 11th, 12th, and 13th instructions, fully advised the jury relative to the law governing the question of imputed negligence, and in this connection stated in these instructions that if plaintiff was but a passive guest of her husband, riding in the vehicle with him, he having the control and management of the horse and buggy, she, under such circumstances, could not be held chargeable with his negligence. But the fact that she was but a passive guest of her husband at the time would not relieve her from exercising ordinary care and caution, and with that degree of judgment and intelligence as should be employed by a person of ordinary prudence, to rescue himself from danger.

The eleventh instruction further informed the jury that they should consider all of the circumstances and surroundings at the time the injury occurred, and determine therefrom and from all of the evidence in the case whether or not plaintiff was guilty of acts of negligence, or of the want of ordinary care which contributed to her injury. This part of instruction 11 was virtually repeated in charge 14, and when the latter is considered, either alone or in connection with other parts of the charge to which we have referred, it certainly cannot be said to be open to the objections advanced by appellant's counsel. Surely the jury must have understood from the charge that on the question of plaintiff's negligence they were to consider her own acts and conduct at the time of the accident, together with all of the other circumstances and surroundings and evidence in the case, and thereby determine the question of contributory negligence.

In the case at bar there is no contention that at the time plaintiff was injured she in any manner undertook to exercise for her safety the care which the law exacts of her through the agency of her husband, who was driving and managing the movements of the buggy in which she was riding at the time. Therefore counsel are mistaken in their contention that the rule of imputed negligence, as asserted in *Abbitt, Adm'r, etc., v. Lake Erie, etc., R. Co.*, 150 Ind. 498, 50 N. E. 729, is applicable.

Instruction No. 18 also meets with objection. By it the court informed the jury that they were the exclusive judges of the credibility of witnesses, and that it was their duty to reconcile, so far as they could, conflicting evidence, etc. It is said that the vice of this charge is to confine the jury to

Knickel v. Chicago & N. W. Ry. Co

the consideration of the interest and character of such witnesses whose evidence was conflicting. The instruction, however, does not warrant this assertion, and cannot be said to be erroneous to the extent which it undertook to inform the jury upon the question of weighing the evidence. If appellant desired a fuller or more complete instruction on the points and matters therein enumerated, it ought to have requested the court to have given one which comported with their view of the law.

Finally, it may be said that the instructions in this case, when considered as a whole, as they must be, disclose no room for appellant to complain that it was in any manner prejudiced by the court's charge to the jury.

We find no available error, and the judgment is therefore affirmed.

KNICKEL, et al. v. CHICAGO & N. W. RY. CO.

(Supreme Court of Wisconsin, Dec. 13, 1904.)

[101 N. W. Rep. 690.]

Fires Set by Locomotives—Negligence—Combustibles Near Track.*

The maintenance by a railroad company of a dilapidated shingle-roof building in close proximity to its tracks, exposed to sparks from its engines, presents a question of negligence for the jury.

Same—Same—Same—Special Verdict.

In an action for destruction of property by fire communicated from a dilapidated building maintained by defendant near its track, questions, in framing a special verdict to the jury, setting up as a test merely what defendant ought to have anticipated, instead of what an ordinarily prudent person under like circumstances would have anticipated, is erroneous.

Curing Error.

The error was cured by the submission and answer to a further question giving the correct standard.

Spark Arresters—Special Verdict.

Where the court, in an action for damages by fire, embodies in its questions for a special verdict the duty of the jury to consider all the conditions and circumstances, it is not error to refuse to insert after "locomotive" in a question, the words "properly equipped with proper spark-arresting machinery in good condition."

Appeal from Circuit Court, Fond du Lac County; Michael Kirwan, Judge.

Action by David Knickel and others against the Chicago & Northwestern Railway Company. From a judgment for plaintiffs, the defendant appeals. Affirmed.

On October 30, 1901, the defendant, without negligence in the construction, repair, or operation of its locomotive, communicated fire, by sparks, to a warehouse permitted to remain upon its right of way some 42 feet from its main

*See foot-note appended to *Simpson v. Enfield Lumber Co.* (N. Car.), 9 R. R. R. 457, 32 Am. & Eng. R. Cas., N. S., 457.

Knickel v. Chicago & N. W. Ry. Co

track, which fire, by reason of a very high wind, and aided by the dilapidated condition of the warehouse, to be hereinafter mentioned, was communicated to plaintiff's premises about 40 rods away, whereby his barn and considerable personal property was destroyed. The warehouse in question was very old and dilapidated, roof never having been repaired or reshingled in about 30 years of the life of the building, the shingles and roof boards being rotted, and the former loose and curled up, and in many places missing entirely, so as to expose the roof boards. The jury, by special verdict, found the defendant guilty of negligence in permitting the warehouse to remain where it was, which was the proximate cause of the burning of plaintiff's property; which result ought, by a man of reasonable care and prudence, under the circumstances, to have been reasonably anticipated. After motion to reverse the answers to such questions and to set aside the verdict and grant a new trial, judgment was entered in favor of the plaintiff, from which the defendant appeals.

Edward M. Hyzer, for appellant.

M. L. Lueck and T. L. Doyle, for respondents.

DODGE, J. (after stating the facts). The jury having negatived all charges of defective apparatus or of negligence in operation of the same, this case presents nothing of the peculiar liability of railroad companies in the conduct of their inherently dangerous business. It presents a question equally applicable to every property owner who maintains an inflammable building in close proximity to railroad tracks over which engines must pass, emitting, as they always do, some measure of sparks. It may be conceded, for the purpose of discussion, that maintenance of frame buildings with shingle roofs within 40 feet of a main railroad track is so common that such act alone is, as matter of law, not negligence; it being so in accord with the known custom of the great mass of mankind. That, however, is not the question upon which this case turns. Though it be conceded that the maintenance of a sound, solid building near a railroad track is not negligence, must it not be held that some degree of variance from such a condition, whereby ignition from the ordinary perils of the railroad becomes more probable, may be so variant from the ordinary conduct of mankind as to open the door for a jury to characterize it as negligence? It seems this must be so. Indeed, counsel for the appellant does not controvert this view. He seems to concede that, if inflammability was increased by the age and dilapidation characterizing this building, the door was open to the jury to consider whether it exceeded in that respect buildings maintained by the great mass of mankind, and, if so, to find the conduct negligent in the legal sense, if the other element of reasonable anticipation of injury might also be found.

The principal argument, however, is that there is no evi-

dence that old and decayed wood, when dry, is more inflammable than sound wood, equally dry. Counsel insists that, if such be the fact, it is capable of proof by experts, or those having special experience on the subject. But this discussion ignores other elements in the evidence to the effect that not only were the roof boards and shingles upon the top of this building decayed and old, but that they were loose, curled up, and that in many places the shingles were entirely lacking. These facts seem clearly to present a situation more likely, in common knowledge, to furnish a lodgment for flying cinders than if the roof were sound, and covered with smooth, flat shingles; and that such enhanced peril of ignition presents properly a jury question whether it extended to the degree of negligence, namely, the absence of that care and caution which ordinarily prudent persons do exercise under like circumstances, and so that the ordinarily prudent person would anticipate that sparks such as fly from the usual locomotive engine might probably lodge and ignite the roof in times of drouth and high wind.

Still another element of possible negligence in the maintenance of such a building is the increased peril that after ignition it may, by reason of its dilapidation, looseness of shingles, and the like, more readily communicate the fire to other buildings. In connection with this idea it is shown that the warehouse was set upon posts three or four feet from the ground, with no inclosure under it, so as to furnish an underdraft of air, giving it almost the effect of a funnel, thus rendering probable, if not certain, the more easy and rapid carrying away of the burning brands, attached so loosely as they were to the roof. This was, of course, an element of the negligence ascribed to the defendant if it increased the probability of communicating fire to other buildings. One may be as careless as he pleases with reference to his own property, and not be chargeable with negligence in law, unless an ordinarily prudent person might reasonably anticipate that such carelessness might probably result in injury to others. We are not prepared to say that the extreme dilapidation of this building in the respects above suggested did not present a case from which a reasonable mind might conclude that there was negligence.

2. By the sixth question of the special verdict the court inquired of the jury whether the negligence of the defendant in maintaining the building in question was the proximate cause of plaintiff's loss, and, in connection with that question, instructed the jury that it might be such proximate cause when such injury is the natural and probable consequence of the negligence, and "when, in the light of all the attending circumstances, the party chargeable with such negligence should reasonably have foreseen that it might cause some similar injury." Also that they might answer the question in the affirmative if they found "that the defendant com-

pany, acting through its proper representatives and servants, should reasonably have foreseen, before the fire occurred, that such negligence might result in communicating fire to other property." It is urged by appellant that these instructions are erroneous, in that they set up as a test merely what the jury think the defendant ought to have anticipated, instead of that which an ordinarily prudent person, under like circumstances, would have anticipated. This subject was quite fully discussed in *Atkinson v. Transportation Company*, 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352, and in *Dehsoy v. Ry. Co.*, 110 Wis. 412, 416, 85 N. W. 973. In the latter case, in speaking of a charge which allowed the jury to consider the care and foresight which might reasonably have been anticipated of the conductor of a street car, we said: "It permits the jury to use as a standard their ideal of what a conductor ought to be, instead of that which he customarily is, as ascertained by actual human experience and common knowledge. In this, error was committed." The instruction complained of was erroneous in this respect, and necessitates the conclusion that in the sixth question and answer, standing alone, are not found all the elements of proximate cause. That question and answer probably did find, under instructions which are not assailed, actual or natural causation, but did not find that element of anticipation by a reasonably prudent man, which in so many cases has been said to be essential. We are convinced, however, that this failure of the jury to find this issue in answer to the sixth question is cured by question 9th, which inquired directly: "Ought a man of reasonable care and prudence, engaged in the same business that the defendant was in at the time in question, and under similar conditions and circumstances, to have reasonably anticipated that, because of the condition that the Degenhart warehouse was in, it would be likely to take fire from sparks emitted from the stack of a locomotive, and that the burning brands or shingles would be carried from the fire so started, under similar conditions, to the property of the plaintiff, forty rods away, or to other property as far away in that vicinity, and set fire to the same." In this question the jury were given the correct standard, and have found the element of anticipation which, by reason of the erroneous charge above mentioned, escaped them in the sixth.

The appellant further complains that the court refused to embody in this question 9th, after the word "locomotive," the words "properly equipped with proper spark-arresting machinery in good condition." There was no error in refusing this request. There had been considerable evidence of cinders and sparks of a size inconsistent with such equipment and condition; and while, by the verdict, it is now recognized as a fact that there was no defect, it was one of the controverted issues when the verdict was submitted. The court embodied in the question the duty to consider all the condi-

Gregory v. Wabash R. Co

tions and circumstances, which, of course, included the condition of the engine, as they might find it. Further, however, it is not to be expected that the court shall attempt, in framing a special verdict, to embody all the facts and circumstances as in a hypothetical question to an expert. An attempt to do so would involve much of danger, for any omission might be very misleading.

We find no error well assigned.

Judgment affirmed.

GREGORY v. WABASH R. CO.

(Supreme Court of Iowa, Dec. 17, 1904.)

[101 N. W. Rep. 761.]

Speed of Trains—Opinion Evidence.*

One familiar with running of trains, and who has general knowledge as to their rates of speed, is competent to give an opinion as to the speed of a train he has observed.

Killing of Child on Track—Negligence after Discovery of Peril—Questions for Jury.

Where a child two years old was run over on a railroad track by a train, it may be shown that the engineer, after seeing the child, did not sound the whistle; the questions whether in the exercise of a prudent judgment he should have sounded it, and whether the accident would thereby have probably been avoided, being questions for the jury.

Same—Same—Evidence.

Though the only duty of trainmen to a trespasser on the track arises after they discover his danger, their testimony as to when they became aware of his presence is not conclusive; so that evidence that the engineer's view of the track was unobstructed for a considerable distance as he approached a child on the track, in connection with his testimony that he was keeping a lookout, and the fact that alarm signals, having apparently reference to no other cause than the perceived presence of the child, were given before the time when, according to his testimony, he saw the child, are competent as tending to show he did see the child before the time testified to by him.

Appeal—Objections Not Made below

Objection to questions, in an action for negligence, that they called for evidence of distinct prior acts of negligence, cannot be urged for the first time on appeal.

Misconduct of Counsel.

Where misconduct of counsel is not such that it could not have been prevented, or that any resulting prejudice could not have been removed by a direction to the jury, reversal cannot be had on account thereof, it not having been complained of below.

Impeachment of Witnesses.

A witness having testified that he did not give a certain signal, and on cross-examination denied that at a certain time and place, and in the presence of certain persons, he said that he did not give such signal, testimony that at such time and place he made such statement is admissible for purpose of impeachment.

*See foot-note appended to Cronk v. Wabash R. Co. (Iowa.), 12 R. R. R. 429, 35 Am. & Eng. R. Cas., N. S., 429, foot-notes appended to Omaha St. Ry. Co. v. Larson (Neb.), 12 R. R. R. 643, 35 Am. & Eng. R. Cas., N. S., 643.

Gregory v. Wabash R. Co

Killing Trespasser on Track—Liability.†

To make a railroad company liable for death of a trespasser killed by a train, the action of those in charge of the train in failing to take reasonable precautions to avoid the injury after the trespasser was seen need not have been willful and wanton.

Value of Life—Evidence.

Evidence, in an action for death of a girl two years old, that her father was a farmer and her mother a housekeeper, and that the wages of female teachers in the neighborhood was from \$30 to \$35 a month, held sufficient to go to the jury on the value of her life to her estate.

Appeal from District Court, Appanoose County; M. A. Roberts, Judge.

Action to recover damages for the death of plaintiff's intestate, due, as alleged, to the negligence of defendant's employees in the operation of a train. Verdict for plaintiff for \$1,210. From judgment on this verdict, defendant appeals. Affirmed.

Fee & Fee, for appellant.

C. F. Howell and W. R. C. Kendrick, for appellee.

McCLAIN, J. Plaintiff's intestate, a female child about two years of age, was killed by being run over by the engine of a passenger train on the defendant's track, at a place where there was no crossing or footway, either by law or custom; and the questions argued relate to the negligence of the engineer operating the engine, and the measure of damages in accordance with which recovery was allowed.

1. Several witnesses for plaintiff testify as to the speed of the train just before the accident, the question of speed being important in determining whether, after the child was seen by the engineer, he could by the exercise of reasonable prudence and diligence have stopped the train. The witnesses were shown to have traveled on trains and noticed their rates of speed, and it appears to us that they showed themselves to be competent to give an opinion as to the rate of speed at which the train was running. If such witnesses are not competent, then it would be almost impossible to secure any evidence with reference to the rate of speed of a train from other witnesses than the employees of the company operating such train. One who is familiar with the running of trains, and who has general knowledge as to their rates of speed, may give an opinion as to the rate of speed of a particular train which he has observed. *Pence v. Chicago, R. I. & P. R. Co.*, 79 Iowa, 389, 44 N. W. 686; *Van Horn v. Burlington, C. R. & N. R. Co.*, 59 Iowa, 33, 12 N. W. 752.

2. Plaintiff was allowed to introduce evidence, over defendant's objection, tending to show that no signal or alarm was given by the blowing of a whistle after the engineer saw

†See foot-notes appended to *Hortenstine v. Virginia-Carolina Ry. Co.* (Va.), 12 R. R. R. 616, 35 Am. & Eng. R. Cas., N. S., 616, foot-note appended to *Gregory v. Louisville & N. R. Co.* (Ky.), 12 R. R. R. 293, 35 Am. & Eng. R. Cas., N. S., 293.

Gregory v. Wabash R. Co

the child on the track and before the accident. The argument for appellant on this point is that in the case of a child of such tender years the blowing of the whistle would not have served as a warning, but would have been quite as likely to stupify the child with terror, and thus prevent its escape from the track, as to communicate to it a warning of danger of which it might take advantage for the purpose of escaping. But it seems to us that the question whether, in the exercise of a prudent judgment, the engineer should have given an alarm signal, was one of fact for the jury. Evidence was introduced on each side bearing on this question, and the engineer, as a witness, excused himself for not giving the alarm signal by explaining that it might have had the opposite effect from that intended. We cannot say as a matter of law that the sounding of the whistle would have increased the peril of the child, nor, on the other hand, that a child of such age, if its attention had been attracted by the signal, might not have got off the track and escaped danger. If the latter result would have followed, either by reason of the natural instinct to avoid danger on being frightened, or by reason of the exercise of an intelligent judgment, and if the engineer, in the exercise of a prudent judgment, had reason to believe that in either of these ways danger to the child would have been lessened by giving the signal, it was his duty to do so, and it was proper to leave the question of fact to the jury. It might well be that if the child was not in immediate danger, but was so near the track that if frightened it might put itself in peril, not being of sufficient years of discretion to exercise a prudent judgment, then there would be a good excuse for not giving the alarm signal. But we can hardly see how, in the case of a child actually on the track and unconscious of the approach of a train, any increase of danger would be involved in giving the alarm signal, while there would be some possibility, at least, that the effect of the alarm would be to cause the child to get out of danger by reason of the instinct of self-preservation, if not in the exercise of an intelligent judgment. The question was properly submitted to the jury as one of fact. *Masser v. Chicago, R. I. & P. R. Co.*, 68 Iowa, 602, 27 N. W. 776. And see, as having some bearing on the question, though not directly in point, *Graybill v. Chicago, M. & St. P. R. Co.*, 112 Iowa, 738, 84 N. W. 946; *McGill v. Minneapolis & St. L. R. Co.*, 113 Iowa, 358, 85 N. W. 620. In this connection, we may notice a criticism of one instruction in which the court explained to the jury that in determining the question of the engineer's negligence they might take into consideration, among other things, "whether an alarm would have had the result to frighten the child, and, if so, whether the result would have been to cause the child to remain on the track or to move off the track." It seems to us that this language suggests to the jury the view which we have above expressed, and is not

Gregory v. Wabash R. Co

subject to criticism. It is also urged in this connection that the defendant was not liable on account of the failure to give the signal after the danger to the child became apparent to the engineer, if the accident would necessarily have happened even if the signal had been given. Of course, this is true, but we think it was properly left to the jury to say whether the accident would probably have been avoided if such signal had been given. In this respect the jury were fully and properly instructed.

3. Counsel contend that in rulings on evidence, in instructions to the jury, and in overruling the motion for a new trial, the court failed to properly apply the rule, recognized in this state, that as to a trespasser upon the track the railroad company is under no duty to lookout for his safety until his danger becomes known to those operating the train; in other words, that there is no duty to look out for trespassers, but only a duty on the part of the company's employees, after they are aware that a trespasser is in danger, to exercise proper care to avoid injury to him. There is no controversy as to the correctness of this rule; but we have held that, in determining whether the employees of the company did see the trespasser in time to have avoided injury to him in the exercise of proper care, the plaintiff is not concluded by the testimony of the employees themselves as to when they did in fact become aware of the presence of the trespasser, but that all the circumstances bearing on that question are for the consideration of the jury. *Farrell v. Chicago, R. I. & P. R. Co.* (Iowa) 99 N. W. 578; *Johnson v. Chicago, M. & St. P. R. Co.* (Iowa) 98 N. W. 312; *Purcell v. Chicago & N. W. R. Co.*, 117 Iowa, 667, 91 N. W. 933; *Barry v. Burlington R. & L. Co.*, 119 Iowa, 62, 93 N. W. 68, 95 N. W. 229. Therefore it was competent to show that the engineer's view of the track was unobstructed for a considerable distance as he approached the child, for this evidence, in connection with the evidence of the engineer that he was keeping a lookout, would bear on the question whether he did in fact see the child sooner than he testifies that he did see it. In this connection, testimony that alarm signals were given before the time when, as the engineer testifies, he did actually see the child, these signals having apparent reference to no other danger or cause of alarm than the perceived presence of the child on the track, was competent as tending in some measure to indicate that the engineer did observe something on the track before, as he testifies, the child was first seen.

4. Several objections are argued on the theory that the court allowed evidence to be introduced relating to prior fatal accidents caused by an engine in the charge of the engineer who was operating the engine which caused this accident. As an abstract proposition, proof of such prior accidents would not be admissible, unless, perhaps, as sup-

porting the claim that the company was negligent in employing this engineer in view of their knowledge of his negligence on previous occasions. But there is no such question in this case. However, an investigation of the record shows that the objection made is not well founded. The engineer, who was a witness for the defendant, testified as to the effect which the giving of an alarm signal might have had upon the child, and referred to previous accidents in his experience. He was cross-examined with reference to these previous accidents, and led to disclose the fact that two men had at different times been run over and fatally injured by his engine while he was operating it. Counsel for plaintiff made great point of this in the cross-examination and in the argument to the jury; but with reference to the cross-examination it is to be noticed that no objection to the questions were made on the ground that they called for evidence of a distinct prior act of negligence. As this objection was not urged at the time, it cannot be urged now.

5. Much is said in argument about misconduct of counsel for plaintiff, not only in referring to the two previous accidents while this engineer was operating his engine, but also in explaining why not more than 2,000 was claimed in the original petition (the reason assigned being that the claim of a larger amount would have enabled defendant to remove the case to the federal court), and in commenting on the amount recovered in another similar case. The remarks of counsel were apparently unwarranted; but no objection was made at the time, nor afterwards in motion for a new trial, and counsel are in the position, therefore, of asking us to reverse this case on a ground not brought in any way to the attention of the trial court. It must be borne in mind that in actions at law this court is a court for the correction of errors, and in general, in such cases, we can only review the action of the trial court as to objections which have been properly raised before it. It is possible, of course, that misconduct may be so flagrant that no action of the court could cure the error, and possibly in such cases we ought not to require the complaining party to go through the formality of objecting to the argument and asking for a new trial. Without passing, however, definitely on that question, we are satisfied in this case that the misconduct was not such that it could not have been prevented, or the resulting prejudice, if any, removed by a direction of the trial court to the jury; and under these circumstances we would not be justified in reversing on account of the misconduct alleged. *Taylor v. Pacific Mut. L. Ins. Co.*, 110 Iowa, 621, 82 N. W. 326; *Mackerall v. Omaha & St. L. R. Co.*, 111 Iowa, 547, 82 N. W. 975; *Gorham v. Sioux City Stockyards Co.*, 118 Iowa, 749, 92 N. W. 698; *Pence v. Chicago, R. I. & P. R. Co.*, 79 Iowa, 389, 44 N. W. 686.

6. A witness was permitted, over defendant's objection, to

testify to statements afterward made by the engineer with reference to whether or not he gave an alarm signal. This testimony was not competent to show an admission binding on the defendant, but it was not introduced for that purpose. The engineer, having testified that he gave no such signal, was asked on cross-examination whether he did not at a time and place specified, and in the presence of persons named, say that he did give such signal; and, upon his denial, the testimony of the witness that such statement was made at the time and place described was admissible for purposes of impeachment, and it was plainly introduced for that purpose.

7. The court instructed the jury that it was not necessary, in order to entitle the plaintiff to recover, that they find that the injury was inflicted willfully or intentionally by the engineer; and of this counsel for appellant complain, taking the position that where the injured person is a trespasser, and the liability of the company is only sought to be established on the ground that, after being aware of the danger to the trespasser, the employees of the company were at fault in not avoiding such danger, the action of such employees, in order to warrant recovery, must be willful and wanton. It may be true that in some of the cases of this character this court has referred to the willful and wanton character of the acts of railroad employees in failing to take reasonable precautions to avoid injury after the trespasser was seen; but certainly this court has never announced the rule that under such circumstances the company will not be liable unless the conduct of its employees was intentional, willful, or wanton; and, so far as we can discover, the rule uniformly adhered to has been that if, after the employees in charge of the train become aware of danger to a trespasser on the track, they can, by the exercise of such care as a reasonably prudent person would exercise under the circumstances—that is, the highest possible degree of care in view of the fact that human life is involved—avert such danger, it is their duty to do so; and the company will be liable for their failure in this respect, which failure will be attributed to the company as negligence. *Orr v. City Railway Company*, 94 Iowa, 423, 431, 62 N. W. 851; *Sutzin v. Chicago, M. & St. P. R. Co.*, 95 Iowa, 304, 63 N. W. 709; *Kelley v. Chicago, B. & Q. R. Co.*, 118 Iowa, 387, 92 N. W. 45; *Purcell v. Chicago & N. W. R. Co.*, 109 Iowa, 628, 80 N. W. 682, 77 Am. St. Rep. 557; *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa, 71; *Burg v. Chicago, R. I. & P. R. Co.*, 90 Iowa, 106, 57 N. W. 680, 48 Am. St. Rep. 419. By answers to special interrogatories propounded at the request of the defendant, the jury exonerated the engineer from intentionally or willfully causing the death of the child; but these answers did not exonerate him from neglect. It is evident that the jury found that he was negligent, though not acting with any intention or desire

Gregory v. Wabash R. Co

to cause the child's death. The jury were correctly instructed on the subject of neglect, and there was evidence to support the verdict in this respect.

8. Finally, it is urged that there was no evidence as to the value of the life of intestate to her estate. Evidence was introduced, apparently without objection, that the wages of female school-teachers in the vicinity of intestate's home was from \$30 to \$35 a month; but there was no other evidence as to the value of the life of a female child two years of age; that is, what the earnings of such child would be from the time of majority to the limit of expectancy of life. The father of the deceased was a farmer, and the mother a house-keeper. The court instructed the jury that the evidence as to these matters was not admitted for the purpose of establishing a presumption that the child would have become a school-teacher, and directed them that the evidence could be considered as bearing on the position in society and the relative status of the family in which the child lived, and the opportunities afforded in that locality to young women to pursue an independent calling, and that it was for the jury to say, "from these facts and all the evidence bearing on this question, with the assistance of the knowledge and observation common to all alike, what, if any, independent calling or business deceased would have followed, and the amount of the estate, if any, she would have accumulated had she lived out her expectancy." That in such a case the jury are not to be limited to award nominal damages merely because it is impossible to prove what the occupation of the child would have been, and the compensation which would have been received in such calling, is well settled. *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa, 71, 80; *Hively v. Webster County*, 117 Iowa, 672, 91 N. W. 1041; *Eginoire v. Union County*, 112 Iowa, 558, 84 N. W. 758; *Farrell v. Chicago, R. I. & P. R. Co. (Iowa)* 99 N. W. 578. If the court had been asked to direct the jury that in establishing the damages to the child's estate they should find the present worth of what the aggregate earnings of the child, from majority until the end of expectancy of life, less the ordinary expenses of living, would have been, no doubt some such instruction should have been given; but no instruction on this subject was asked, and we think that what the court said was not substantially nor prejudicially erroneous. *Andrews v. Chicago, M. & St. P. R. Co.*, 86 Iowa, 677, 685, 53 N. W. 399. In such cases, the best that can be done is to direct the jury as to the general basis on which the right to recover is founded, and allow them to fix such sum as is in their judgment reasonable. It is evident in this case that the jury did not allow the total amount of the earnings of a school-teacher at \$30 a month, nor even the total net earnings at that rate for the period of expectancy of life after majority, which appeared from the Carlisle Life Tables introduced in evidence.

McVean v. Detroit United Ry

No complaint is made that the verdict is excessive, and we are satisfied that the jury did not adopt any unreasonable basis for computation of the amount.

We have discussed the principal errors which are relied upon; others which are urged are so obviously without merit that we do not find it necessary to refer to them. A motion to strike appellee's amended abstract is submitted with the case, but on an examination of the record we think that it should be overruled.

The judgment of the trial court is affirmed.

McVEAN v. DETROIT UNITED RY.

(Supreme Court of Michigan, Nov. 29, 1904.)

[101 N. W. Rep. 527.]

Street Railways—Frightened Team—Duty of Motorman.*

Where a railway track was laid in the street so that only 12 feet and 7 inches of driveway was left between the west rail and the curb, and the car by which plaintiff was injured projected 22½ inches beyond the track, defendant's motorman, approaching the vehicle in which plaintiff was riding from behind, and seeing other vehicles in such narrow space, and that plaintiff's horse appeared to be frightened, was bound to immediately bring his car under control, so far as it was possible for him to do so.

Same—Same—Contributory Negligence.

Plaintiff, a girl 15 years of age, was riding with her sister in a buggy drawn by a horse ordinarily gentle, but which became frightened at the approach of a street car at a high rate of speed, causing dust and leaves to fly into the air. Plaintiff, who was obliged to act quickly, and not knowing the speed of the car or its exact distance from her, attempting to alight, to hold the horse by the head until the car passed, when the car struck her: *held*, that plaintiff was not guilty of contributory negligence, as a matter of law.

Error to Circuit Court, Oakland County; George W. Smith, Judge.

Action by Ethel McVean against the Detroit United Railway. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Defendant's track runs over North Saginaw street, in the city of Pontiac. The street is 30 feet 2 inches wide, the distance between the west rail and the curb being 12 feet and 7 inches. The car projected 22½ inches beyond the track. Plaintiff, 15 years old, was riding with her sister in a buggy drawn by one horse. Her sister was driving, sitting on the right side of the buggy, next to the curb; plaintiff, on the left side, next to the track. They were going south. De-

*As to the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-note appended to *Anniston Electric & Gas Co. v. Hewitt* (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas., N. S., 312.

McVean v. Detroit United Ry

fendant's car approached them from behind. The horse became somewhat frightened. Plaintiff jumped from the buggy, with the intention, as shown by the testimony of her sister, of getting the horse by the head and holding him while the car passed. As or immediately after she jumped from the buggy, the car struck her, inflicting serious injury. The horse was gentle and accustomed to cars. The negligence charged is that the defendant ran the car at an excessive and unlawful rate of speed, thereby causing the dust and leaves to fly in the air, which frightened the horse, and that the motorman did not keep his car under sufficient control. The jury found, in reply to special questions propounded to them by the defendant, that the act of plaintiff "in getting out of the buggy was the act of an ordinarily prudent person of her years, under similar circumstances, taking into account the narrowness of the street and the speed of the approaching car; that, if the car had been traveling at the rate of four or five miles per hour, the motorman could have stopped the car in time to prevent hitting the plaintiff; and that the commotion of the leaves and dust raised by the speed of the car frightened the horse." She obtained a verdict and judgment.

Brennan, Donnelly & Van De Mark and James H. Lynch, for appellant.

Patterson & Patterson, for appellee.

GRANT, J. (after stating the facts). Defendant's counsel insist that there was no negligence on the part of the defendant, and that the plaintiff was guilty of contributory negligence in jumping from the buggy. The defendant, both in reason and under the authorities cited by the defendant, could not be held liable for the commotion of leaves and dust caused by running at the ordinary and lawful rate of speed. The case was not submitted to the jury upon that theory. The evidence on the part of the plaintiff tended to show a speed as high as 20 miles an hour, and that this usual rate of speed caused an unusual commotion of leaves and dust, which frightened the horse. The motorman admitted that, when he saw the horse appeared to be frightened, he did not at once bring his car under control, but gradually reduced its speed. There were other vehicles in this narrow space, and we think it was the duty of the motorman, on seeing that any horse in such a place was frightened, to immediately bring his car under control, so far as it was possible for him to do so.

The plaintiff was not, as a matter of law, guilty of contributory negligence. We cannot say that it was an imprudent thing for her to alight for the purpose of getting the frightened horse by the head, in the attempt to hold him while the car passed. She was obliged to act quickly. She could not tell the speed of the car, or the exact distance it

Carpenter v. Chicago, etc., Ry. Co

was from her when she began to alight. It may have seemed to her that there was ample time for her to alight and seize the horse by the head before the car passed.

The questions of negligence on the part of the defendant and of the plaintiff were properly submitted to the jury. This case is ruled by the following decisions, and the cases which are there cited: *Chauvin v. Detroit United Ry. (Mich.)* 97 N. W. 160; *Selleck v. Lake Shore & Mich. Southern Ry. Co.*, 93 Mich. 375, 53 N. W. 556, 18 L. R. A. 154; *McClellan v. Ft. Wayne, etc., Ry. Co.*, 105 Mich. 101, 62 N. W. 1025; *Montgomery v. Lansing City Electric Ry. Co.*, 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287.

Judgment affirmed. The other Justices concurred.

CARPENTER v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Iowa, Dec. 14, 1904.)

[101 N. W. Rep. 758.]

Killing of Railroad Contractor—Duty to Slacken Speed of Train—Sufficiency of Evidence.

In an action for death of a railroad contractor by being struck by a train, evidence of conversations between such contractor and defendant's train dispatcher and a telegraph operator with reference to requiring all trains to slow down as they approached the bridge where the contractor was working was properly disallowed, in the absence of evidence that such servants had authority to bind the defendant in the premises.

Same—Same—Same.

In an action for death of a railroad contractor by being struck by a train at the point where the work was being prosecuted, which was not of such a character as to interrupt the ordinary operation of trains, the railroad company was not guilty of negligence in failing to reduce the speed of trains at that point, in the absence of evidence that any one connected with the operation of the road and in authority had knowledge that work was being done at the time and place in question.

Same—Duty to Signal Where Train Is Seen.*

Where a railroad contractor was killed while attempting to get his team from in front of an approaching train, which he saw nearly as soon as the enginemen could have discovered him, and the evidence tended to show that the injury was caused by his remaining on the track too long in his endeavor to get his horses from the track, the railroad company was not guilty of negligence in failing to give warning of the approach of the train by whistle or bell.

Appeal from District Court, Polk County; W. H. McHenry, Judge.

Action by plaintiff, as administratrix of the estate of L. C. Carpenter, deceased, to recover damages for personal injury to her intestate, resulting in his death. The material facts respecting the accident are not involved in controversy. It appears that Carpenter and one Sisley were engaged in filling

*See foot-note appended to *Louisville Ry. Co. v. Colston (Ky.)*, 12 R. R. 668, 35 Am. & Eng. R. Cas., N. S., 668.

Carpenter v. Chicago, etc., Ry. Co

with earth the west end of a bridge near the station of De Soto, on the line of the defendant's railway. The earth for the purpose was being obtained from the right of way adjacent to such bridge. The method of procedure was by plowing up the earth, using a span of horses and a common plow therefor, and by then taking up and transporting the earth by means of wheeled scrapers. Carpenter was struck by a passenger train approaching from the west, and instantly killed. The circumstances of the accident are detailed by Sisley—he being the only witness testifying thereto—as follows: Carpenter started to do some plowing, and, when about 200 feet west of the bridge, he undertook to cross the railway track from north to south with his team and plow. He had a boy driving the team, and he (Carpenter) was holding the plow. In some way the point of the plow ran under the north rail, between the ties; and the team—a span of vicious horses—kept on pulling until the rail became wedged in between the point and the beam of the plow. The witness says that the train from the west was due, and they were expecting it; that from where he stood down at the bridge he heard it coming, and, looking up, saw it come around a curve in the track between 600 and 700 feet west of where Carpenter, the boy, and the team were; that he called to Carpenter to look out for the train, whereupon the boy threw the lines to Carpenter, and ran away; that Carpenter seized the lines and tried to pull the horses off the track, and, failing in this, he ran around to the heads of the horses, and began beating them back off the track, and succeeded in doing so, but failed on his own part to get off the track and save himself. On motion, at the close of the evidence for plaintiff, there was a directed verdict in favor of defendant, and judgment against plaintiff for costs. Plaintiff appeals. Affirmed.

McLennan & Brennan, for appellant.

Carroll Wright and J. I. Dille, for appellee.

BISHOP, J. One ground of the motion to direct a verdict was that there was no proof of any negligence on the part of defendant which was the proximate cause of the accident and injury. The acts of negligence as charged in the petition may be summarized thus: First, that the train in question was being run at a speed of more than 60 miles an hour, whereas the defendant, through its officers and agents, had promised and agreed to slow down all trains as they approached the bridge; second, that no warning by whistle or bell of the coming of the train was given to employees working at said bridge; third, that at a point about 300 feet west of the bridge a whistle warning should have been given for a highway crossing the track about 300 feet east of the bridge, and none such was given.

1. In respect of the ground of negligence first stated, it

will be sufficient to say that the evidence wholly fails to show that a promise or agreement had been made as alleged. Plaintiff attempted to prove by Sisley conversations upon the subject had between himself and Carpenter, on the one hand, and one Gibney, a train dispatcher in Des Moines, and also the telegraph operator at De Soto, on the other hand. This evidence was ruled out, and properly so. Gibney was connected with another division of the plaintiff's road. Moreover, no preliminary proof was made to the effect that a train dispatcher or a station telegraph operator had any authority in the premises. Even if this were not so, there is no evidence in the record tending to prove that any one connected with the operation of the road, and in authority, had knowledge that work was being done at the time at the bridge in question. And the work being done was not such as to interrupt or interfere with the ordinary operation of trains over the road.

2. The other matters of negligence alleged may be disposed of in brief. We need not stop to consider what might have been the effect of the situation had Carpenter been unconscious of the approach of the train. The fact is that he was advised of the danger about as soon as the enginemen could have discovered him. Now, manifestly, negligence cannot be predicated upon a failure of duty to warn when the person to be warned is fully alive to and presently advised of the impending danger, and this practically as soon as the warning could have been given. Nor can it be said that in such a case the failure of duty—conceding that the duty existed—was the proximate cause of the accident; and this, if for no other reason, because under the circumstances shown the accident would have occurred irrespective of any warning that might have been given. What we have said applies to the failure to sound the whistle for the highway crossing, and with even more force, as it appears that in respect thereof the duty did not arise until the train was within about 100 feet from the place occupied by Carpenter on the track. In conclusion, the facts bring the case within the principle which governs in cases of accidents upon highway crossings. If the traveler see or hear the train approaching, or is otherwise warned as thoroughly as he would have been had the whistle been sounded or the bell rung, he cannot bottom a charge of negligence on a failure to sound an alarm, as such cannot be said to be the proximate cause of the accident. *Willoughby v. Railway*, 37 Iowa, 432; 2 *Thompson on Negligence*, § 1558.

The verdict was rightly directed, and the judgment is affirmed.

PATTERSON et ux. v. PITTSBURG, C., C. & ST. L. RY. CO.

(Supreme Court of Pennsylvania, Nov. 4, 1904.)

[59 Atl. Rep. 318.]

Accident at Crossing—Presumption of Due Care by Deceased—Rebuttal.

In an action for death at a crossing, whether the presumption that deceased stopped, looked, and listened before driving on the tracks is rebutted is for the jury unless the evidence to the contrary is either uncontradicted or so indisputable that a verdict against it would be set aside as a matter of law.

Same—Same—Same—Sufficiency of Evidence.*

The presumption that deceased, killed at a railroad crossing, looked and listened, is not rebutted as a matter of law where three persons testified that as he approached the crossing they did not see him stop, but one of them testified that there was a "bump" in the road, and that deceased was back of this long enough to have stopped.

Appeal from Court of Common Pleas, Washington County.

Actions by Josiah Patterson against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company and by Clara B. Patterson against the same defendant. Judgments for plaintiffs, and defendant appeals. Affirmed.

At the trial it appeared that on July 4, 1903, at about noon, John T. Patterson and Samuel Patterson, while riding in a wagon, were killed at a grade crossing by a collision between the wagon and a passenger train. The defendant claimed that the presumption that the deceased stopped, looked, and listened before driving upon the tracks had been rebutted by the proofs. The testimony on this subject is summarized in the opinion of the Supreme Court. In both cases the court refused binding instructions for defendant. Verdict for Josiah Patterson for \$10,000, on which judgment was entered for \$6,000, all above that sum having been remitted. Verdict and judgment for Clara B. Patterson for \$11,000.

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, POTTER, and THOMPSON, JJ.

Alex. M. Todd and James A. Wiley, for appellant.

T. F. Birch, for appellees.

PER CURIAM. These two cases grew out of the same accident, and raise the same question. The plaintiff was entitled to go to the jury on the presumption that the deceased did his duty to "stop, look, and listen" before driving on the tracks. Whether that presumption was rebutted was for the jury, unless the evidence to the contrary was clear, positive, credible, and either uncontradicted or so indisputable in weight and amount as to justify the court in

*As to the presumption of due care on the part of a person killed by a train, see foot-note appended to *Bain v. Northern Pac. Ry. Co.* (Wis.), 12 R. R. R. 31, 35 Am. & Eng R. Cas., N. S., 31.

Central of Georgia Ry. Co. v. McWhorter

holding that a verdict against it must be set aside as a matter of law. The testimony in this case falls short of that standard. Three witnesses testified to having seen the deceased as he approached the crossing, and that they did not see him stop, but none of them covered the entire approach. Even Wise, the most important witness of all, testified there was a "bump" (a dip) in the road where he lost sight of the deceased, and in answer to the question, "Before they [the deceased] went on the track that day, did they stop or did they not?" answered, "They was back there long enough to stop behind that bump," and, being asked to give his best judgment, said, "I would say they must have stopped, for they was back there long enough to stop." While there was testimony persuasive that they did not stop, it was not so positive or so complete as to justify the judge in saying as a matter of law that the presumption had been rebutted.

Judgment affirmed.

CENTRAL OF GEORGIA RY. CO. v. McWHORTER.

(Supreme Court of Georgia, Dec. 12, 1904.)

[49 S. E. Rep. 264.]

Railroads—Killing Stock—Evidence—Presumptions.*

According to the testimony of the company's engineer, the horse for the killing of which the plaintiff sought to recover damages suddenly ran upon the track, about 20 yards ahead of his engine, and then down the center of the track to the point where it was killed; and he used every effort to avoid injury to the horse, and could not sooner have discovered its presence on or near the track because of a curve in the roadbed, a high embankment, and some bushes. The testimony offered by the plaintiff tended to show that, notwithstanding the curve, the embankment, and the bushes, the horse might have been seen at least 144 yards from the point where the animal was killed; that the horse had walked some 200 yards along the track in the direction of the approaching train, and had then turned and fled from it a distance of 20 yards, never leaving the track at all, so that the animal could not, as testified by the engineer, have suddenly run in front of the engine from a point adjacent to the roadbed. In view of this conflict in the evidence, and of the fact that the defendant did not undertake to show that the injury to the animal could not have been prevented, even though it had been seen on the track 144 yards distant from the engine and all precautionary measures had been promptly taken, the verdict in favor of the plaintiff was warranted, the presumption of law being that the company was guilty of negligence.

(Syllabus by the Court.)

Error from Superior Court, Walker County; W. M. Henry, Judge.

Action by W. C. McWhorter against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

*See monograph appended to *Macon & B. R. Co. v. Revis* (Ga.), 12 R. R. R. 787, 35 Am. & Eng. R. Cas., N. S., 787.

Sprague v. Atchison, etc., Ry. Co

J. Branham and F. W. Copeland, for plaintiff in error.
Bale & Shaw, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concur.

SPRAGUE v. ATCHISON, T. & S. F. RY. CO. et al.

(Supreme Court of Kansas, Dec. 1, 1904.)

[78 Pac. Rep. 828.]

Fires Set by Locomotives—Evidence—Issues.

Where there is no question involved as to the emission of igniting sparks by a particular locomotive engine, or that it would throw such sparks to the place where a particular fire is alleged to have started, it is not error for the court to refuse to permit the plaintiff to show that other engines of the company had emitted igniting sparks shortly before and immediately after the fire in question.

Same—Combustibles on Right of Way—Duty of Company—Effect of Lease to Private Individual.*

A railroad company is not absolved from the duty of keeping its right of way clear and free from combustible material by leasing a portion thereof to a private person, and it may be made to respond in damages for fire started on that portion so leased by reason of combustible material thereon.

(Syllabus by the Court.)

Error from District Court, Lyon County; Dennis Madden, Judge.

Action by E. F. Sprague against the Atchison, Topeka & Santa Fe Railway Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

The plaintiff by this proceeding seeks to reverse the orders, rulings, and judgment of the court below made and rendered against him in an action brought to recover damages alleged to have been the result of a fire set by defendant's employees while operating its engines and conducting its business. There are many grounds of negligence alleged and relied upon for a recovery, among which are the following: "Plaintiff alleges that on the 4th day of September, 1901, in said city of Emporia, county and state, that said defendant railway company, contrary to its duty in that regard, by itself and its agents and servants, carelessly and negligently failed to have and keep its grounds and right of way in said city free and clear from dry and combustible materials, and carelessly and negligently permitted dry and combustible wooden sheds and wooden buildings, with wooden roofs, to be and remain upon its said grounds and right of way, close to its railroad tracks, and where they were liable to and would be ignited by sparks and fire from its engines. That each and

*See foot-note appended to *Lewis v. Maysville & B. S. R. Co.* (Ky.), 11 R. R. R. 780, 34 Am. & Eng. R. Cas., N. S., 780, where all the preceding authorities in this series are collected.

every of the engineer and engineers, the fireman and firemen, of the engine and engines of the defendant railway company which started said fire, were at and about the time of its starting, and for a long time prior thereto had been, habitually incompetent, inexperienced, unskillful, negligent, and careless, of each and all of which said defendant railway company at all of said times had notice and knowledge; that, at the time when said fire was started, said engineer and engineers, fireman and firemen, by reason of such incompetence, inexperience, unskillfulness, negligence, and carelessness, ran, operated, and handled such engine and engines in an unskillful, incompetent, improper, negligent, and careless manner, and by reason thereof said fire was started. And that none of the engines of said defendant railway company, which were used and operated on said railroad at said place, at and about the time of the setting out and communicating of said fire, were supplied with suitable and safe spark arresters and netting, in good order and safe condition; but plaintiff is unable to allege more specifically the particular engines in question, or the details of the unsuitableness and lack of safe condition, design, and order of said spark arresters and netting. That at said time and place, in the operation by said defendant railway company of its said railroad, one or more of the engines used and operated by the defendant railway company, by itself and its agents and servants, set out and communicated fire. That said fire was caused by the operation of said railroad, and was set out and communicated by reason of and as the results of each and every of the particular acts, conduct, omissions, and defaults of and in the carelessness and negligence of said defendant railway company, and of its agents and servants, as hereinbefore stated. That said fire ignited and burned the wooden sheds and wooden buildings, with wooden roofs, hereinbefore referred to, upon the grounds and right of way of the defendant railway company, and spread and communicated continuously and forthwith to the said premises of the plaintiff, and his real and personal property situated thereon."

Buck & Spencer, W. A. Randolph, John H. Atwood, and John G. Egan, for plaintiff in error.

A. A. Hurd and O. J. Wood, for defendants in error.

GREENE, J. (after stating the facts). One of the principal questions in this case arises on plaintiff's exception to the ruling of the court excluding evidence offered by him to prove that other engines at other times, immediately before and after the fire in question, had remitted sparks and set fire to grass and other combustible material in the vicinity of where the present fire originated. This evidence was offered for the purpose of showing the origin of this fire. The plaintiff, in his opening statement to the court and jury, identified the particular engine that set the fire which caused

the damage as engine No. 2,319. There was no contention by the defendant that a locomotive engine could not throw such sparks over the distance between its tracks and the sheds where it is alleged the fire started. In the absence of such question, evidence that other engines driven at other times by other persons had thrown sparks which had ignited combustible material in the vicinity of the fire in question was not competent. After a careful examination of the authorities cited by plaintiff in error in support of his contention, and a research of others, we have been unable to find support of his theory. We believe it may be said, with at least a reasonable degree of certainty, that such authorities do not exist. Language carelessly used by the courts, while discussing kindred questions, may be found which, upon a cursory examination, might appear to sustain such principle, but a more critical investigation will disclose that this precise question was not involved nor decided. Where a particular engine is alleged to have set the fire, and the question is whether a locomotive engine would throw igniting sparks, or would throw them the distance claimed, evidence that other of defendant's engines similarly constructed, and under similar circumstances, had thrown igniting sparks that distance, is properly admissible. Where, however, the engine which set the fire cannot be identified, and the origin of the fire is unknown, evidence that other engines owned and operated by the defendant had under similar circumstances, both before and after the fire in question, thrown igniting sparks which caused other fires, is competent because of the difficulty of otherwise proving that the fire in question was started by sparks from a locomotive engine of the defendant. Such uncertainty and difficulty does not exist where the engine which is alleged to have thrown the igniting sparks is known. In the present case the identity of the engine was known. The negligence relied on to support a recovery was that the particular engine was defectively constructed, not supplied with the latest and best approved spark arrester, and its operators incompetent and negligent in its management. Under such circumstances evidence of the negligent and incompetent management of other engines at other times by other employees, or the defective construction or lack of proper spark arresters or other appliances, would not assist in determining whether the identified engine was defective or lacking in any of its parts, or negligently or incompetently managed. Such evidence would tend to confuse rather than make plain the fact in issue.

The following authorities show the position taken by the courts and commentators on this question, and we think they fully sustain our position:

In *Henderson v. Railroad Co.*, 144 Pa. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652, it is said: "When the fire is shown to have been caused, or, in the nature of the case,

could only have been caused, by sparks from an engine which is known and identified, the evidence should be confined to the condition, management, and practical operation of that engine; and testimony tending to prove defects in other engines of the company is irrelevant and inadmissible."

In *Gibbons v. The Wisconsin Valley Railroad Co.*, 58 Wis. 335, 17 N. W. 132, it is said: "Where, in an action for the damage done by a fire alleged to have been set by a locomotive, there is no evidence that the fire was caused by any other than one of two particular locomotives, evidence as to other fires along the same line of road caused by locomotives other than those two is inadmissible." On page 340, 58 Wis., page 134, 17 N. W., it is also said: "In cases where it is shown, either by positive or circumstantial evidence, that some locomotive of the company caused the fire, without the identification of any particular one, such evidence might have weight in showing the negligence of the company. There may be cases which have gone further than this in the admission of such evidence, but they do not appear to us authority in reason."

To the same effect is the case of *First Nat. Bank v. L. E. & W. R. R. Co.*, 174 Ill. 36, 50 N. E. 1023, where it is said: "Where the particular locomotive alleged to have caused the fire for which suit is brought against a railroad company is identified, evidence of other fires set by different locomotives of the company, before and after the fire complained of, is not admissible."

In *Ireland v. Railroad Co.*, 79 Mich. 163, 44 N. W. 426, it is said: "Where, in a suit against a railroad company for setting fire to plaintiff's factory by a defective engine, the particular engine is known and designated, it is not competent to show generally that the defendant's engines have caused fire at other times and places, but such particular engine may be shown to have done so, by means of escaping sparks, to show its defective construction."

In *Coale et al. v. Han. & St. Jo. R. R. Co.*, 60 Mo. 227, it is said: "In suit against a railroad company for damages caused by the escape of sparks from a locomotive, testimony offered to prove the insufficiency of the engine or the negligence of the engineer, by showing that fire had escaped from other locomotives of a similar pattern, was rejected as collateral and incompetent."

In *Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co.*, 114 Fed. 133, 52 C. C. A. 95, it is said: "Where the engine which alone could have set the fire is identified, testimony that other engines of the defendant set fires or threw sparks at other times is incompetent, in the absence of proof of similar condition and operation."

It may be suggested that, at the time plaintiff offered to prove that other engines had thrown igniting sparks imme-

Sprague v. Atchison, etc., Ry. Co

diately before and after the damaging fire, he had offered no evidence to show that such engines were constructed or equipped with spark arresters similar to engine No. 2,319. On the rebuttal, however, plaintiff introduced a deposition of Mr. Player, in which the witness testified that the engines operated on the Emporia Division prior to and at the time of the alleged fire were similar in their construction and equipped with the same kind of spark arresters and steamed with the same kind of coal, but no attempt was made thereafter to reintroduce this excluded evidence. The reason given for the exclusion of such evidence is strongly stated by Judge Orton in *Gibbons v. The Wisconsin Valley Railroad Co.*, 58 Wis. 335, 17 N. W. 133, 337: "Such evidence would open the door for a wide issue of great importance—whether such other locomotives caused such fires or not—and could not affect the issue in this cause, even if it had been proved that other locomotives caused other fires in the vicinity. The rule has never been extended further than to allow proof of other fires caused by the same machinery. If it had been proved in this case that one of these locomotives—either that of the freight or passenger train passing soon or immediately before the fire occurred—caused the fire, it could not add to the defendant's liability by showing its habitual carelessness in respect to other locomotives; and if it had been proved that other locomotives on the same road caused other fires, at other times and places, it would not be even presumptive evidence that the locomotives in question were insufficient in any respect, or that they caused this particular fire."

In support of plaintiff's contention, reliance is placed upon the following cases:

Piggott v. Eastern Counties R. Co. T. T., 3 C. B. 229, is claimed to be authority for such position. The exact reason for sustaining the lower court in admitting evidence of fire started by other engines is stated by Tindal, C. J., in the following language (page 241): "I think it clearly was admissible for the purpose for which it was received, viz., to ascertain the possibility of fire being projected from the engine to such a distance from the railway as the building in question." On page 242, Maule, J., says: "The matter in issue was whether or not the plaintiff's property had been destroyed by fire proceeding from the defendant's engine, and involved in that issue was the question whether or not the fire could have been so caused. The evidence was offered for the purpose of showing that it could, and for that purpose it was clearly material and inadmissible." It appears, therefore, that the question which we are discussing was not presented in that case.

In the case of *Smith v. Old Colony & Newport Railroad Company*, 10 R. I. 22, 27, the court does not place the admission of the evidence showing that other engines had set fire, immediately before the one complained of, upon the

ground contended for by the plaintiff, but it is there said: "We think there are two purposes for which such testimony may be admissible. The fact that other fires have been communicated before, and especially if recently before, the occurrence of the fire in question, is a fact which should put the company on their guard and stimulate them to increased watchfulness, and therefore testimony relating to such fire might properly pass to the jury, to enable the jury to judge whether, in view of their previous occurrence, the company was, at the time of the fire in question, in the exercise of reasonable care. For this purpose, however, no testimony should pass to the jury relating to fires subsequent to the fire in question. * * * A second purpose for which such testimony might be admissible is this, namely, to show the possibility of communicating fire by sparks from a locomotive, if any question were made upon that point, and for this purpose it would be immaterial whether the testimony related to fires of an earlier or later date than the fire in question."

Counsel also cites section 2372, vol. 2, Thompson's Commentaries on the Law of Negligence, which states the doctrine that, for the purpose of showing that it was possible for sparks from an engine to be carried to the distance between the track and the property it is alleged to have ignited, where such question is a material one, such evidence is admissible. This author, however, in section 2371, states the rule thus: "That in actions for damages caused by the negligent escape of fire from locomotive engines it is competent for the plaintiff to show that, about the time when the fire in question happened, the engines which the company was running past the place of the fire were so managed in respect to their furnaces as to be likely to set on fire objects in the position of the property burned; or to show the emission of sparks or ignited matter from other engines of the defendant passing the spot upon other occasions, either before or after the damage occurred, without showing that they were under the charge of the same driver, or were of the same construction, as the one causing the damage. But where the engine which scattered the fire is identified, it is not competent to prove that other engines of the same company also scattered fire."

In Longabaugh v. Virginia City & Truckee R. R. Co., 9 Nev. 271, the engine that set the fire was not identified. It was there held that under the facts of the case such evidence was admissible. The same was true in Duning v. Me. Cent. R. R. Co., 91 Me. 87, 39 Atl. 352, 54 Am. St. Rep. 208, and in Chicago Ry. Co. v. Gilbert, 52 Fed. 711, 3 C. C. A. 264. In the latter case, on page 713, 52 Fed., page 265, 3 C. C. A., the court says: "We must not, in the consideration of this question, lose sight of the issues involved. In the case at bar it was not admitted by the company that the fire was caused by sparks escaping from a particular engine, in which

event the query would be as to the condition of that particular engine and the mode in which it was handled. On the contrary, the parties were at issue as to the origin of the fire, the plaintiffs claiming that it was due to fire escaping from some one of the engines of the company, and the defendant that it was due to fire escaping from the mill itself." It will be observed that in this case there was no identification of the engine. It was upon this ground the court permitted the evidence.

The case of *Texas & Pacific Ry. v. Watson*, 190 U. S. 287, 23 Sup. Ct. 681, 47 L. Ed. 1057, has no application whatever to our question. The evidence admitted in that case, over which the question arose, was of other fires set by the identified engine, which were discovered immediately after the particular engine had passed. There is no dispute among the authorities upon this question. It may always be shown that the identified engine set other fires immediately before or after the fire of which complaint is made.

Grand Trunk R. R. Co. v. Richardson et al., 91 U. S. 454, 23 L. Ed. 356, is quoted by counsel as an authority, and it is also referred to by some cyclopedists as sustaining the contention of plaintiff in error. On page 471, 91 U. S., 23 L. Ed. 356, we find the following statement: "In this case it was proved that engines run by the defendant had crossed the bridge not long before it took fire. The particular engines were not identified; but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire, and it seems to us that under the circumstances this probability was strengthened by the fact that some engines of the same defendant, at other times during the same season, had scattered fire during their passage." It will be observed that the engine was not identified.

Attention is also directed to *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47. An examination of that case will disclose that the engine which it is alleged set the fire was not identified.

Numerous errors are predicated on the ruling of the court in sustaining objections to questions put by plaintiff to his own witnesses, and also to questions put by plaintiff, on cross-examination, to the defendant's witnesses. We shall not undertake to refer specifically to each of such contentions, but only to those we think material. A. L. Favorite, the fireman on engine No. 2319 when the fire in question started, answered, over plaintiff's objection, that he considered himself a competent fireman. Before this question was asked, the witness had given his experience as a railroad man. It was shown that he had not passed the necessary examination required of firemen, and that he was a handy man only. The jury were in full possession of all the facts, and were qualified to answer the question. Favorite's answer, therefore, could not have been prejudicial. The

same is true of the objection sustained to the question asked Goodhue, defendant's general foreman, as to Favorite's competency. It was of small consequence what Goodhue thought; the jury were in possession of all the facts concerning Favorite.

Another contention is that the court erred in excluding the evidence offered by plaintiff to prove that about two years before the fire in question some of the engines belonging to the defendant threw igniting sparks onto the roof of the shed where the damaging fire started. It is said this evidence was offered to show that these sheds were combustible. We think that under the circumstances of this case this evidence was too remote. Whether they were combustible was a fact susceptible of direct proof; their exact condition, when the fire occurred, was easily susceptible of direct proof, and from such evidence the jury would have been able to determine the question. This evidence would have opened a field of investigation wholly aside from the true controversy. It would have involved an examination of the condition as they existed at that time, and all the circumstances attending the alleged previous fire.

Complaint is also made of the refusal of the court to give special instructions Nos. 9 and 10. These instructions were based upon the evidence of previous and subsequent fires started by other engines of the defendant. Since it has been determined that such evidence was properly excluded, it follows that the court did not err in refusing to give the instructions. The principles announced in special instructions Nos. 26 and 27, requested by plaintiff, are sufficiently covered by other instructions given by the court.

A more serious question arises on the objection of plaintiff to the giving of instruction No. 9th. This instruction reads: "You are instructed that if you find from the evidence that the coal sheds in which the fire complained of originated were located upon a lot belonging to the defendant, but said lots were leased to other parties, and the said parties erected the coal sheds and had control thereof, the defendant would not be responsible for the bad or inflammable condition of such sheds; but under such circumstances you can consider their presence for what you think it is worth in determining whether or not defendant's servants on the engine in question had notice or knowledge thereof, and exercised ordinary care in operating its engine in the vicinity thereof." One of the alleged grounds of negligence relied upon for a recovery was that the defendant carelessly and negligently failed to keep its grounds and right of way free and clear from combustible material, and carelessly and negligently permitted dry and combustible wooden sheds and buildings, with wooden roofs, to be and remain upon its grounds and right of way close to its tracks, and where they were liable to and would be ignited by sparks from its engine.

Western Union Tel. Co. v. Pennsylvania R. Co

Evidence was introduced tending to prove that certain coal sheds were upon the company's right of way and extending over and onto other lands belonging to the company, and that such sheds were combustible, and that the fire in question started in these sheds from sparks from one of defendant's engines. By the rule thus stated, the mere fact that the company had leased a part of its right of way, or other property adjacent thereto owned and held by it for use in the operation of its road, to a private person, would release the company from any liability for a fire started by sparks from one of its engines coming in contact with combustible material placed, or permitted to accumulate, thereon by the lessee.

A railroad company cannot absolve itself from keeping its right of way, and property adjacent thereto held by it for use in the operation of its road, free and clear from combustible material, by leasing such property, nor can it place such lease as a defense in an action for damage by fire ignited by sparks from one of its engines falling into combustible material placed, or permitted to collect and remain, thereon by such lessee, if it would have been liable had the property remained in the actual possession of the company. For this reason, the judgment is reversed, and the cause remanded for further proceeding. All the Justices concurring.

WESTERN UNION TELEGRAPH COMPANY, Appt. and Petitioner,
v. PENNSYLVANIA RAILROAD COMPANY and United New
Jersey Railroad & Canal Company.

(Argued October 19, 20, 1904, Decided December 12, 1904.)

[25 Sup. Ct. Rep. 133.]

Eminent Domain—Rights of Telegraph Companies on Railway Rights of Way—Federal Statute.*

Telegraph companies were not granted the right of eminent domain, or any right to enter upon and occupy the rights of way of railway companies without the latter's consent, by the act of July 24, 1866 (14 Stat. at L. 221, chap. 230; Rev. Stat. §§ 5263 et seq. U. S. Comp. Stat. 1901, p. 3579), giving telegraph companies the right to construct, maintain, and operate telegraph lines through and over the public domain, and "over and along any of the military or post roads of the United States," since such statute must be deemed but an exercise by Congress of its power to withdraw from state interference interstate commerce by telegraph.

Same—Same—Same.*

Railway rights of way are not made public property by charter provisions declaring the railways "public highways," so as to subject such rights of way to occupation by telegraph companies without the consent of the railway company, under the act of

*For the authorities in this series on the subject of the right to condemn a railroad right of way for telegraph lines, see foot-note appended to *Cleveland, etc., Ry. Co. v. Ohio Postal T. C. Co.* (Ohio), 12 R. R. R. 251, 35 Am. & Eng. R. Cas., N. S., 251.

Western Union Tel. Co. v. Pennsylvania R. Co

July 24, 1866, giving telegraph companies the right to construct, maintain, and operate telegraph lines through and over the public domain, and "over and along any of the military or post roads of the United States."

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a case pending in that court on an appeal from a final decree of the Circuit Court for the District of New Jersey dismissing a bill to enjoin any interference with the use by the Western Union Telegraph Company of railway rights of way for telegraph purposes. Affirmed. Also—

Appeal from the United States Circuit Court of Appeals for the Third Circuit to review a decree which reversed an order of the Circuit Court for the District of New Jersey granting a preliminary injunction in the same suit. Affirmed.

See same case below on appeal from order granting preliminary injunction, 59 C. C. A. 113, 123 Fed. 33.

Statement by MR. JUSTICE McKENNA:

This is a bill in equity filed in the circuit court of the District of New Jersey by the appellant against the appellee, the Pennsylvania Railroad Company, to prevent the latter from removing from various railroad companies' rights of way the telegraph lines of the appellant. The bill was filed in aid of a petition on the law side of the court, praying the court to issue its process or take such modes of procedure as might be agreeable to the principles and usages of law, to determine the amount of compensation to be paid by appellant to appellee for the use of the right of way of the appellee, and its branches and connecting lines, to construct, maintain, and operate a line of telegraph over and along such railways, subject to the conditions and provisions named in the act of Congress of July 24, 1866. 14 Stat. at L. 221, chap. 230, Rev. Stat. §§ 5263 et seq. U. S. Comp. Stat. 1901, p. 3579.

The construction of this act of Congress is the main question in the case.

The appellant, which we shall designate the telegraph company, contends that under certain acts of Congress the roads of the railroad company and all other railroads in the United States are made post roads, and that by the act of July 24, 1866, the telegraph company has the right to construct, maintain, and operate lines of telegraph along said roads upon the payment of compensation to the railroad company. In other words, the contention is that by the act of 1866 the telegraph company is given the power of eminent domain to acquire the right to occupy with its telegraph lines the rights of way of the railroad company.

A summary of the bill is as follows: The telegraph company is a New York corporation; the railroad company is a Pennsylvania corporation. The New Jersey Railroad &

Canal Company was incorporated under the laws of New Jersey, and is the owner of a railroad extending from Jersey City, in the state of New Jersey, to the Delaware river at the city of Trenton, in said state, with certain branches, which the bill describes. The railroad company is the owner of a line of railroad extending from the city of Philadelphia to the city of Pittsburg, in the state of Pennsylvania, and in possession and control of the railroads of the New Jersey Railroad & Canal Company in New Jersey, under a lease or leases for a period of 999 years from the 1st of July, 1871. By the laws of New Jersey the said railroads were created and made and are now public highways, and hence are subject to occupation and use of telegraph companies under the provisions and conditions of the act of Congress of July 24, 1866.

The telegraph company was organized in 1851, and began then to construct and has constructed and acquired a continuous system of telegraph lines, which extends through all of the states and territories of the United States, and connects with telegraph lines in the Dominion of Canada, and with lines also in the Republic of Mexico and South American Republics, and with and by submarine cables with the systems of all telegraph lines of foreign countries.

The system operated directly by the telegraph company consists of over 192,000 miles of poles and cables, and over 900,000 miles of wire; and an important part of the system and connected with its main office in New York city, and with other lines leading to the important cities of the West, is the lines of telegraph over and along the lines of railway operated by the railroad company, connecting Jersey City with Philadelphia, and connecting with other lines of the system.

The lines of telegraph along the railways in New Jersey were originally constructed by the American Telegraph Company, a corporation of the state of New Jersey, with the consent of, or under contracts and arrangement with the railway company then owning the said lines of railway, and were constructed more than forty years ago; and since the 20th of September, 1881, the telegraph lines over the right of way of said railroads have been maintained and operated and compensation paid therefor under the provisions of a contract between the telegraph company and the railroad company. The contract granted to the telegraph company the right to place, maintain, and use upon the line of the right of way of the railroad company, and of the railroads owned, operated, or leased by it, a single line of telegraph poles (in certain cases two were authorized), with the privilege of erecting and maintaining thereon such number of wires as the telegraph company might from time to time elect, said lines to be located and placed under the direction of an officer of the railroad company.

The telegraph company agreed to pay annually for the privileges granted the sum of \$75,000, in monthly instalments of \$6,250, and to deliver to the railroad company certain poles and wire, which were then on certain of their roads. The telegraph company also agreed to transmit the messages of the railroad company at a compensation which was stated.

The provisions for the termination of the agreement and in the event of its termination are as follows:

"Thirteenth. This agreement is to continue in force for and during the term of twenty years from its date, and shall be binding upon the respective companies, their successors and assigns, and neither party shall have the right to assign the whole, or any part thereof, without the consent of the other, given in writing.

"Fifteenth. If any monthly payment herein provided for be not made within sixty days after it shall have become due, and shall have been demanded by written notice, delivered to the treasurer, or an executive officer of the party in default, or if any other covenant herein made shall not, after sixty days' written notice of default and demand made by either party in the manner herein provided, be fulfilled by the other party, the contract may, at the option of the party demanding such fulfilment, be rescinded, and such rescission shall not relieve the party in default from liability for any amount due, or for damages for nonfulfilment of such covenant or of any other covenant.

"Sixteenth. If no new agreement be made by the parties hereto, the telegraph company shall, at the termination of this contract, or at any time hereafter, upon receiving written notice from the railroad company, remove, within six months from the receipt of said notice, all of its poles and wires, and leave the property of the railroad company in good condition and free from the encumbrance thereof to the satisfaction of the general manager or other proper officer of the railroad company, and if not so removed the railroad company may remove them at the expense of the telegraph company: Provided, however, That the payment agreed to be made by the telegraph company to the railroad company in the sixth clause hereof, and by the railroad company in the eighth clause, shall not apply to the said six months, the companies respectively hereby expressly agreeing to waive the same."

The agreement contains the following provision:

"Any easement or right of way heretofore acquired by the telegraph company upon any of the roads embraced in this agreement, either directly by contract or by assignment of contracts or agreements made by other companies with the railroad company, or with any of the companies whose roads or property are embraced in the schedule hereto attached, is

Western Union Tel. Co. v. Pennsylvania R. Co

hereby relinquished and abandoned, and the rights and easements of the telegraph company upon the right of way of said railroad company shall be such only as are granted by this agreement, and shall cease with its termination."

The agreement was carried out and the payments made as provided, the last being made on the 20th of June, 1902.

On the 14th of May, 1902, the railroad company notified the telegraph company in writing to remove its poles, wires, and other property from the right of way and property of the railroad company and of the other companies mentioned in the agreement, within six months from the 1st day of June, 1902. The notice stated that in default of compliance the railroad company would itself cause such poles, wires, and other property of the telegraph company to be removed from the right of way at the expense of the latter company.

It is alleged in the bill that, by reason of the facts set forth, and by reason of the receipt of payments after the 21st of September, 1901, and after the notice of removal, the agreement was continued in force, and that the railroad company had no right, notwithstanding the notice of May 14, 1902, to remove or cause to be removed from the line of its railways the poles, wires, and telegraph property of the telegraph company at the end of six months from the 1st day of June, 1902.

It is also alleged that the lines of telegraph have been maintained and operated over the lines of railway without interfering with the ordinary use and operation thereof, or the ordinary travel thereon, and, as now located, maintained, and operated, can be continued so as not to interfere with the future operation and maintenance of the said railways, or the ordinary travel upon them, subject only to such slight changes of some of the poles of said lines as may be incident to the construction of additional tracks upon said right of way, or shifting the tracks already existing on said railways.

May 20, 1902, the president and general manager of the telegraph company, in a letter addressed to the president of the railroad company, acknowledged receipt of the notice of removal of May 15, and stated that he understood that negotiations had been in progress between the officers of the respective companies for a renewal of the contract of September 20, 1881, and declared that he would be glad to take up the matter actively either in New York or in Philadelphia, at the convenience of the president of the railroad company. The following day the president of the railway company replied, stating that none of the companies named "desires to renew or extend its contract with the Western Union Telegraph Company," and that the contract between the companies had terminated under its terms on the 20th of September, 1901, and the notice to the telegraph company to remove its poles had been given in accordance with the provisions of the contract. A willingness to discuss any

temporary arrangement which might be necessary during the time allowed for the removal of the poles of the telegraph company was expressed. A somewhat lengthy reply was made, in which the telegraph company claimed that since some of the contracts referred to by the railroad company were perpetual in their terms, or ran during the life of the parties, they could not be terminated by one party without the consent of the other; asserted a right, under the laws of Congress and the laws and Constitution of the state of Pennsylvania, to maintain and operate its lines of telegraph on the railroad company's roads, subject only, at most, to make a fair and reasonable compensation for such right, which it offered to pay, and requested, if the railroad company declined to contract further with it, a meeting for the purpose of agreeing upon the amount of such compensation, or to submit the matter to arbitration. The railroad company replied that the meeting requested would be useless, as the telegraph company asserted rights upon the lines of the railroad company which could not be conceded. It was stated in the reply that the railroad company had agreed and contracted with the Postal Telegraph Cable Company covering the railroads included in the contract with the telegraph company, and that the Postal Telegraph Cable Company would immediately commence transacting a commercial telegraph business at the stations of the railroad company. The railroad company offered to permit the telegraph company to do business at the railroad stations until September 30 next ensuing (1902); and for the purpose of avoiding unnecessary loss to the telegraph company, incident to the removal of its poles, the railroad company expressed a willingness to purchase, at a fair valuation, such of the lines as it could make use of.

It is alleged in the bill that the notice given to the telegraph company to remove its poles from the railroads, and the refusal of the railroad company to negotiate further with the telegraph company, were not induced from any compulsion or necessity to use the space occupied by the telegraph lines, but that the purpose of the railroad company is to place upon the lines of railway telegraph lines to be owned or used by another telegraph company; and it is alleged that the lines of the telegraph company will not interfere with the ordinary travel and use of the railways.

The directors of the telegraph company accepted the act of July 24, 1866, and filed an acceptance with the Postmaster General of the United States June 8, 1867.

The acts of Congress hereinafter mentioned and set out are referred to in the bill, and a full compliance therewith alleged, whereby, it is further alleged, the telegraph company became and is entitled to maintain its lines on the railroads of the railroad company upon paying just compensation, the payment of which was offered. The prayer is that the court

Western Union Tel. Co. v. Pennsylvania R. Co

order and decree the amount of compensation to be paid by the telegraph company, or, if the court order compensation to be ascertained at law, it then be decreed that upon payment of such compensation a perpetual injunction issue.

A preliminary injunction was ordered. 120 Fed. 981. It was reversed by the circuit court of appeals. 59 C. C. A. 113, 123 Fed. 33.

A controversy ensued upon the form of the decree. The circuit court of appeals simply reversed the order of the circuit court granting a preliminary injunction. The telegraph company moved that the decree be modified so as to direct the dismissal of the bill. The motion was refused, and the telegraph company took an appeal to this court. Subsequently the circuit court sua sponte entered an order dismissing the bill, and the telegraph company appealed therefrom to the circuit court of appeals. The case was then removed to this court by certiorari.

Messrs. H. D. Estabrook, Rush Taggart, John F. Dillon, and Richard Vliet Lindabury for the Western Union Telegraph Company.

Mr. John G. Johnson for the railroad company.

MR. JUSTICE McKENNA, after stating the case as above, delivered the opinion of the court:

By an act of Congress approved July 7, 1838 [5 Stat. at L. 271, chap. 172] and by subsequent acts (March 3, 1853, 10 Stat. at L. 255, chap. 146; Rev. Stat. § 3964, U. S. Comp. Stat. 1901, p. 2707; June 8, 1872 [17 Stat. at L. 283, chap. 335,]) railroads within the limits of the United States were made post routes or roads.

By act of March 1, 1884, it is provided "that all public roads and highways, while kept up and maintained as such, are hereby declared to be post routes." 23 Stat. at L. 3, chap. 9, U. S. Comp. Stat. 1901, p. 2708.

The act of 1866 is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any telegraph company now organized, or which may hereafter be organized under the laws of any state in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States: Provided, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials

Western Union Tel. Co. v. Pennsylvania R. Co

for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said line of telegraph, and may pre-empt and use such portion of the unoccupied public land subject to pre-emption, through which its said lines of telegraph may be located, as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"Sec. 2. And be it further enacted, That telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster General.

"Sec. 3. And be it further enacted, That the rights and privileges hereby granted shall not be transferred by any company acting under this act, to any other corporation, association, or person: Provided, however, That the United States may at any time after the expiration of five years from the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected.

"Sec. 4. And be it further enacted, That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance, with the Postmaster General, of the restrictions and obligations required by this act."

The construction of this act is the fundamental question in the case. The telegraph company contends that the necessary implication from the provisions of the act is that telegraph companies may enter and appropriate for their poles and lines a part of the rights of way of railroads in invitum upon paying just compensation. In other words, that the act invests telegraph companies with the right of eminent domain. The railroad company denies this construction, and asserts that the act gives the consent of the government to telegraph companies to construct lines through its public domain and over and along its military and post roads, which are not the property of private corporations, and across navigable streams and waters. The act gives no right, the railroad company contends, to appropriate private property, but is an exercise by Congress of the national power over interstate commerce to secure telegraph companies from "hostile state legislation or contracts violative of an announced public policy." In other words, the contention of the railroad company is that, after the act of 1866 was passed, it "became impossible for the states, by any legislation, to exclude telegraph companies

Western Union Tel. Co. v. Pennsylvania R. Co

from the post roads." The contentions of the parties are opposed, therefore, only as to the degree of right conferred by the act. It is asserted by one party, and unqualifiedly admitted by the other, that Congress has power to grant the power of eminent domain to corporations organized for national purposes, and the arguments of the parties are addressed only to the considerations which serve to determine the intention of Congress. Both parties also claim authority for their respective contentions.

1. The act of 1866 came before this court for consideration over twenty-five years ago, in *Pensacola Teleg. Co. v. Western U. Teleg. Co.*, 96 U. S. 1, 24 L. Ed. 708. The language of the court defining the rights conferred by the act has recently been repeated and sanctioned in *Western U. Teleg. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 44 L. Ed. 1052, 20 Sup. Ct. Rep. 867. In both cases the judgment of the court was adverse to the rights claimed under that act by the telegraph company in the case at bar. A review of those cases, therefore, and a consideration of the arguments directed against them and in support of them will constitute the most appropriate discussion of the questions now presented, and apply immediately to their solution the authority of this court.

In *Pensacola Teleg. Co. v. Western U. Teleg. Co.*, 96 U. S. 1, 24 L. Ed. 708, the legislature of Florida in 1866 granted to the Pensacola Telegraph Company "the sole and exclusive privilege and right" of maintaining and operating lines of telegraph through certain counties of the state. In 1872 the property of the Alabama & Florida Railroad Company was transferred to the Pensacola & Louisville Railroad Company. On the 14th of February, 1873, the legislature of Florida passed an act, which was amended in 1874 authorizing the last-named company to construct and maintain a telegraph line along its railroad, and to connect with lines in and out of the state. This was in the territory embraced by the exclusive grant to the Pensacola Telegraph Company.

On the 24th of June, 1874, the Pensacola & Louisville Railroad Company granted to the Western Union Telegraph Company the right to erect a telegraph line upon its right of way, and transferred to it all the rights and privileges conferred by the act of February, 1873, and 1874. The Western Union Company immediately commenced the erection of the line, but before its completion the Pensacola Telegraph Company filed a bill to enjoin the work, on account of the alleged exclusive right of that company under its charter. Upon the hearing a decree was passed dismissing the bill, and an appeal was taken to this court. The Western Union Telegraph Company had accepted the act of 1866, and claimed to erect and maintain a telegraph line under its agreement with the Pensacola & Louisville Railroad Company, and under the provisions of that act. The case, therefore, presented an issue between rights asserted under a statute of Florida and

rights given and protected by the act of 1866. The issue was important. The act of 1866 was presented for the first time for interpretation, and upon it depended not only the private rights of the contending companies, but the more serious conflict of powers derived from the national and state governments. The questions, therefore, which bore on these issues called for, and, it is evident from the opinion of the court, received, careful attention.

The first of these questions was whether the act of 1866 was a grant to telegraph companies of portions of the public domain and of rights in the public domain, or a grant of rights having a broader field of exercise,—a grant of rights having operation and to be exercised throughout the whole of the United States. There was a marked difference in the rights contended for, and they depended upon different powers. In the public domain the government was proprietor as well as sovereign, elsewhere only sovereign, and on its powers as sovereign there were limitations, arising not only from the rights of the states, but rising from the ownership of private property and the necessity of a grant of eminent domain to appropriate it. These limitations were of consequence in fixing exactly the rights conferred by the act of 1866, and were regarded by the court in its construction of that act.

The court declared, through Chief Justice Waite, that the act of 1866 was an exercise of the power of Congress over interstate commerce, and the power to establish postoffices and post roads, and, like other powers of the national government, could be exercised "upon every foot of territory under its jurisdiction." It was held, therefore, that the act was not a grant of rights only in the public domain, and the character of the rights was made unmistakable. The statute, the court said, "in effect amounts to a prohibition of all state monopolies" in commercial intercourse by telegraph. This is expressed more than once as the fundamental idea and sole purpose of the statute. The court further said: "It [the statute] substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one state for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege. To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the states, and is appropriate legislation to carry into execution the powers of Congress over the postal service."

And this construction, making the act of 1866 merely an exercise of national power to withdraw from state control or interference commercial intercourse by telegraph, is further emphasized in the opinion and the objections to it completely answered, which were based on the ownership of the post roads by individuals or corporations, and the necessity of implying a grant of the power of eminent domain to telegraph companies to appropriate them. The court said:

"It [the act of 1866] gives no foreign corporation the right to enter upon private property without the consent of the owner, and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

And again:

"No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

This language and the distinctions imported by it were approved in *Western U. Teleg. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 44 L. Ed. 1052, 20 Sup. Ct. Rep. 867. It was a bill in equity filed in the circuit court of Benzie county, Michigan, by a telegraph company against a railway company to restrain the latter from interfering with the rights of the telegraph company in a certain telegraph line along the right of way of the railroad. It was removed to the circuit court of the United States. The circuit court dismissed the bill, and its action was affirmed by the circuit court of appeals. 33 C. C. A. 113, 61 U. S. App. 741, 90 Fed. 379. The Western Union Telegraph Company brought the case here. The decrees of both courts were reversed, and the case remanded to the circuit court, with directions to remand the case to the state court. This was decreed on the ground that, by the statement of the complainant's (telegraph company) own case, it was not brought "within the category of cases arising under the laws or Constitution of the United States." We said that the bill was in effect for the specific performance of a contract. "It is not argued," we said, by the Chief Justice, "by counsel for the telegraph company that the telegraph company had any right under the statute, and independently of the contract, to maintain and operate this telegraph line over the railroad company's property; and it has been long settled that that statute did not confer on telegraph companies the right to enter on private prop-

erty without the consent of the owner, and erect the necessary structures for their business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

And further: "As we have said, it was not asserted in argument that the telegraph company had the right, independently of the contract, to maintain its line on the railroad company's property, and, in view of the settled construction of the statute, we could not permit such a contention to be recognized as the basis of jurisdiction." In other words, by the decision in the Pensacola Case no such Federal question remained to be based on the act of 1866.

Counsel, however, pronounce the extracts quoted from the Pensacola Case and their repetition in the Ann Arbor Case as dicto, and urge, besides, that the irresistible logic of other cases overthrows the authority of both. Neither proposition is tenable. We have said enough to demonstrate that the language we have quoted was the deliberate resolution of the court, and we might content ourselves by observing that, as the Ann Arbor Case is the last expression of this court interpreting the act of 1866, prior cases, if not reconcilable with its exposition of that act, are superseded. We think they are so reconcilable.

One of the cases which is relied on (Western U. Tele. Co. v. Atty. Gen. 125 U. S. 530, 31 L. Ed. 790, 8 Sup. Ct. Rep. 961, asserted the very valuable right obtained by telegraph companies under the act of 1866, and vindicated it against a statute of Massachusetts, which provided for an injunction against the prosecution of business by the company as a means of enforcing the payment of taxes. This is the very essence of the effect given to the act of 1866 by the Pensacola and Ann Arbor Cases. The telegraph company was in occupation of the post roads of the state of Massachusetts, whether railroads or the ordinary highways does not appear. Its right to be there was not controverted, and how it got there was of no consequence. Its right to do business after and during such occupation was involved and was decided, and to this right the language of the court was addressed, and receives limitation from it. The language of the court was substantially the same as that of the act of Congress. It enforced the right given by that act, and gave to the telegraph company the protection of the national power and supremacy, and differs only in the instance, not in the principle, declared in the Pensacola Case. The telegraph company, indeed, sought for more than the mere exercise of a right. It sought to turn the act of 1866 from a mere permission to exercise a right to the creation of such an instrumentality of the national government as to be exempt from state taxation. The court rejected that view.

So also must be limited the language in *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067, and *United States v. Union P. R. Co.*, 160 U. S. 1, 40 L. Ed. 319, 16 Sup. Ct. Rep. 190. In the first the distinction which was necessary to make was between intra- and inter-state commerce, and to determine what rights as to the latter were conferred by the act of 1866. In the second case the efficacy of the act to prevent binding contracts against its policy was involved. The case called for that, but no more, as far as the act of 1866 was concerned. Such an agreement was set up, and under it the Western Union Telegraph Company claimed the right to exclude all other telegraph companies from the roadway of the railway company, notwithstanding the act of 1866. Mr. Justice Harlan, speaking for the court, said that such an agreement "directly tended to make the act of July 24, 1866, ineffectual, and was, therefore, hostile to the object contemplated by Congress. *Pensacola Teleg. Co. v. Western U. Teleg. Co.*, 96 U. S. 1, 11, 24 L. Ed. 708, 711."

We need not dissent from these views, or qualify the general language by which they were amplified and supported. Whatever rights were granted by the act of 1866 were granted to all telegraph companies, and could not be defeated by a binding contract with some one company; nor could such an agreement be used to evade or escape the commands of the statute constituting the Union Pacific Railway, passed in 1862 [12 Stat. at L. 489, chap. 120], or the supplementary act of 1888 [25 Stat. at L. 382, chap. 772, U. S. Comp. Stat. 1901, p. 3583], which was passed by virtue of a power reserved in the act of 1862. The suit was brought to enforce the duties and obligations imposed by those statutes on the railway company. The statutes are quoted in the opinion, and the act of 1866 is referred to only as reinforcing the provisions of the statute of 1862. It was only necessary, therefore, to declare the policy of the act of 1866 as a grant of right to all telegraph companies. The consideration of the court was not directed to anything else. The extent of the rights granted as presented in the case at bar could not have been in contemplation. They were not in issue, and it could not have been intended to anticipate and decide the controversies which might be based upon them.

St. Louis v. Western U. Teleg. Co., 148 U. S. 93, 37 L. Ed. 381, 13 Sup. Ct. Rep. 485, is also urged by the telegraph company as inconsistent with the *Ann Arbor Case*. It is clearly not so. The case involved the validity of a charge or rental made by the city of St. Louis for the use of its streets by the telegraph company. The charge was imposed by the same ordinance that gave permission to the telegraph company to occupy the streets of the city. The telegraph company resisted the charge upon several grounds, among which were the provisions of the act of 1866, and its acceptance by the company. The charge was held to be a valid one, but

on no ground which involved the consideration of the right of the telegraph company to occupy the streets. The right was not disputed. The ordinance of the city conferred it. The claim made under the act of 1866 was that it exempted the telegraph company from a payment of any compensation. But compensation was decreed on the ground that the franchise or privilege granted by the act of 1866 could only be exercised in subordination to public as well as private rights, and, as entry upon the latter could only be made upon the payment of just compensation, entry upon the former was subject to the same payment. This was all that was necessary to decide to sustain the charge made by the city. In other words, it was all that was necessary to decide to meet the extreme contention made by the telegraph company, that under the act of 1866 it was entitled to occupy the streets without charge, notwithstanding its occupation was exclusive and permanent, as the court said it was. It is manifest, to hold that there can be no entry upon property without payment of compensations is not to decide that such entry can be made upon tender of compensation. Certainly, as to private property or rights, the nonconsent of the owner is a factor to be dealt with. Nonconsent, if resolute, can only be overcome by power conferred by law; in other words, by the exercise of eminent domain. The act of 1866 was not considered in that regard.

By this review of the cases it is evidence that there is no inconsistency between them and the Pensacola Case and the Ann Arbor Case, and we are brought to the discussion of the general considerations urged against the latter cases. Construed as they construe the act of 1866, it becomes meaningless, counsel say. If the act grants no rights, it is urged, except by permission of the railroad companies, it confers no more than can be obtained from the railroad companies. The objection is best answered by examples. The telegraph company had such permission in the Pensacola Case. It needed, however, the act of 1866 to make its exercise effectual against the legislation of the state of Florida. In the Union Pacific Case a claim of a monopoly by one telegraph company was answered by the act construed as a grant of rights to all companies. These examples show important results achieved by the act, and the principles of the cases may come to be applied to prevent other hostile action of states or individuals.

This court, when it came to consider the act of 1866 in the Pensacola Case, was confronted, as we are confronted now, with the serious nature of the right of eminent domain. It is indeed "inseparable from sovereignty," but it is accompanied and restrained by inexorable limitations. The property taken must be for a public use, and there must be compensation made for it, and compensation, whether it be regarded as part of the power or a limitation

upon the power, is so far essential that the absence of a provision for it has been regarded as important in determining the intention of the legislature when a grant of such power is claimed. 1 Lewis, Em. Dom. § 240, and cases cited. We said in *Sweet v. Rechel*, 159 U. S. 399, 40 L. Ed. 196, 16 Sup. Ct. Rep. 48, by Mr. Justice Harlan: "It is a condition precedent to the exercise of such power [eminent domain] that the statute make provision for reasonable compensation to the owner." Many state cases were cited, and also *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 34 L. Ed. 295, 10 Sup. Ct. Rep. 965. The act of Congress under review in the latter case, it was contended, did not provide for compensation for the property taken. In reply, Mr. Justice Harlan, delivering the opinion of the court, said: "The objection to the act cannot be sustained. The Constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed. Whether a particular provision be sufficient to secure the compensation to which, under the Constitution, he is entitled, is sometimes a question of difficulty." The requirements of the Constitution were held to be fully met because the act which was under consideration provided that, before the railway which was authorized should be constructed through any of the lands proposed to be taken, full compensation should be made to the owner for all property taken, or damage done by reason of the construction of the road, and in the event of an appeal from the finding of the referee the railway company should pay into court double the amount of the award to abide the judgment.

In *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449, acts of Congress were considered, one providing for the acquisition of a site for a public building, the other an appropriation act. The appropriation made by the latter was "for the purchase, at a private sale or by condemnation, of ground for a site" for the building. The real controversy in the case was whether the acts of Congress intended the site to be obtained under the authority of the state government in the exercise of its power of eminent domain, or by the United States government in its own right and by virtue of its own eminent domain. The court held the latter, and, commenting on the sufficiency of the acts to give the right, said: "The authority here given [the first act] was to purchase. If that were all, it might be doubted whether the right of eminent domain was intended to be invoked. . . . That Congress intended more than this is evident, however, in view of the subsequent and amendatory act passed June 10, 1872 [17 Stat. at L. 352, chap. 415, U. S. Comp. Stat. 1901, p. 2457],

which made an appropriation 'for the purchase, at private sale or by condemnation, of the ground for a site' for the buildings."

But in the act of July, 1866, there is not a word which provides for condemnation or compensation. The rule that when a right is given all the means of exercising it are given does not, as we have seen, apply to the extent contended for by the telegraph company. The exercise of the power of eminent domain is against common right. It subverts the usual attributes of the ownership of property. It must, therefore, be given in express terms or by necessary implication; and this was the reasoning in the Pensacola Case, and applied directly to the act of 1866. We may repeat the language of the court: "If private property is required it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized."

In *Sweet v. Rechel*, *Cherokee Nation v. Southern Kansas R. Co.*, and *Kohl v. United States*, the property to which the constitutional protection was applied was property in private use. Their doctrine applies as well to private property devoted to a public use. There is no difference whatever in principle arising from the difference in the uses. A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement. We discussed its character in *New Mexico v. United States Trust Co.*, 172 U. S. 171, 43 L. Ed. 407, 19 Sup. Ct. Rep. 128. We there said that if a railroad's right of way was an easement it was "one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property." And we drew support for this from a New Jersey case, in which state the rights of way in the case at bar are situated. We quoted *New York, S. & W. R. Co. v. Trimmer*, 53 N. J. L. 1, 3, 20 Atl. 761, as follows: "Unlike the use of a private way,—that is, discontinuous,—the use of land condemned by a railroad company is perpetual and continuous." And it is held in *Pennsylvania* "that a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it." *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457. It is "a fee in the surface and so much beneath as may be necessary for support. . . . But whatever it may be called, it is, in substance, an interest in the land, special and exclusive in its nature." *Pennsylvania S. Valley R. Co. v. Reading Paper Mills*, 149 Pa. 18, 4 Atl. 205; *Philadelphia v. Ward*, 174 Pa. 45, 34 Atl. 458; *Pittsburg, Ft. W. & C. O. R. Co. v. Peet*, 152 Pa. 488, 19 L. R. A. 467, 25 Atl. 612.

A railroad's right of way has, therefore, the substantiality of the fee, and it is private property, even to the public, in

Western Union Tel. Co. v. Pennsylvania R. Co

all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given. It can only be taken by the exercise of the powers of eminent domain; and a condition precedent to the exercise of such power is, we said in *Sweet v. Rechel*, that the statute conferring it make provision for reasonable compensation to the owner of the property taken. This condition is expressed with even more emphasis in *Cherokee Nation v. Southern Kansas R. Co.*

A few words more may be necessary to avoid all possible misunderstanding of the purpose for which we have cited those cases and *Kohl v. United States*. We have cited them, not as tests of the validity of the act of 1866, but as tests of its meaning, supporting the authority of the *Pensacola Case* and *Ann Arbor Case*. We have no occasion to consider the validity of the act of 1866 as an attempt to grant the power of eminent domain. We decide the act to be an exercise by Congress of its power to withdraw from state interference interstate commerce by telegraph. As such, of course, the act is an efficient and constitutional enactment.

Certain cases decided at circuit are cited for our consideration, and we will close this branch of our discussion by a brief review of them.

In *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.*, 104 Fed. 623, and *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.*, 114 Fed. 787, there were views expressed favorable to the contentions made in the case at bar by the telegraph company, but the judgments in both cases were ultimately rested upon the local statutes,—Idaho and Montana,—which granted the right of eminent domain to telegraph companies. We may also observe that the first case went to the circuit court of appeals of the ninth circuit. That court sustained the judgment of the circuit court, upon the statute of Idaho and upon general legal principles. It did not refer to the act of 1866. 49 C. C. A. 663, 111 Fed. 843.

In *Postal Teleg. Cable Co. v. Southern R. Co.*, 89 Fed. 190, and *Postal Teleg. Cable Co. v. Cleveland, C. C. & St. L. R. Co.*, 94 Fed. 234, the act of 1866 was more directly passed on. Both cases were proceedings in eminent domain,—one brought in the courts of North Carolina and removed to the circuit court of the United States; the other brought in the circuit court of the United States for the northern district of Ohio. In passing on the sufficiency of the petition in the first case, Judge Simonton said that the right of petitioner to construct its lines along the right of way of post roads of the United States was given under the act of Congress of 1866; but, he observed, the mode or method of exercising the right conferred was fixed by the laws of the several states, and it

was exclusive in its character in ascertaining the amount of compensation to be allowed. The right of the telegraph company was, therefore, considered and adjudged under the North Carolina statutes.

In the second case a motion was made to dismiss on the ground that the power of eminent domain was not conferred by any law of the United States or the state of Ohio. The motion was sustained. District Judge Ricks said: "The act of July 24, 1866, made no provision for compensation or payment for property to be taken; hence the procedure cannot be sustained by virtue of that act." He cited the Pensacola Case, 96 U. S. 1, 11, 24 L. Ed. 708, 711.

Western U. Teleg. Co. v. Ann Arbor R. Co., 33 C. C. A. 113, 61 U. S. App. 741, 90 Fed. 379, and St. Paul, M. & M. R. Co. v. Western U. Teleg. Co., 55 C. C. A. 263, 118 Fed. 497, were respectively decided by the circuit court of appeals of the sixth circuit and the circuit court of appeals of the eighth circuit. It is difficult to reconcile them. In one it was decided, following the authority of the Pensacola Case, that the telegraph company could not occupy the line of the defendant's railroad without its consent or that of some predecessor in title. This was wanting. In the other it was conceded that the right of entry upon private property was not conferred by the act of 1866, without the owner's consent, yet held that, as consent had been given, no reason could we perceived why a court of equity should compel a removal of the telegraph company's lines from the railway's right of way,—“especially where it appears that no express agreement was made that they should be removed when its lines were erected.”

2. It is contended by the telegraph company that the charters under which the several railway companies constituting the system of the railroad company were organized expressly created them “public highways,” and that in the acquisition of land for their purposes they were public agents, “and the land was taken by the government, and in the eye of the law as completely subject to public uses as though it had been taken by the state itself,”—that is to say, if we understand the argument, have become highways in the full sense of that word. And counsel further say the difference between them and ordinary highways “is not a legal difference, but is the difference of the kind of use to which the highway is subject,—in the one case, wheel vehicles drawn by horses; in the other, to steam vehicles drawn by locomotives along and upon iron rails.” They are subject, therefore, it is urged, as ordinary highways and streets of a city are subject, to the control of Congress by virtue of its power over interstate commerce.

Counsel in advancing the argument exhibits a consciousness of taking an extreme position. It would seem, certainly if considered with other parts of their argument, to make a

railroad right of way public property. To that extreme we cannot go, for the reasons which we have already indicated. The right of way of a railroad is property devoted to a public use, and has often been called a highway, and as such is subject, to a certain extent, to state and Federal control; and for this many cases may be cited. But it has always been recognized, as we have pointed out, that a railroad right of way is so far private property as to be entitled to that provision of the Constitution which forbids its taking, except under the power of eminent domain and upon payment of compensation. The right of way of a railroad was recognized as private property in the Pensacola Case, and we are brought back to the main question,—the interpretation of the act of July, 1866, and upon that we have sufficiently dilated.

It follows from these views that the act of 1866 does not grant the right to telegraph companies to enter upon and occupy the rights of way of railroad companies, except with the consent of the latter, or grant the power of eminent domain. Nor does the statute of New Jersey make those rights of way public property so as to subject them to such occupation under the provisions of the act of 1866.

It is admitted that the statutes of New Jersey do not confer the right of eminent domain upon the telegraph company.

3. In view of our conclusion, it is not necessary to consider the question whether, if the power of eminent domain were granted by the act of 1866, it would be within the competency of a court of equity to ascertain compensation, or that compensation might be determined at law. That question was pertinent in *Kohl v. United States*. It is not pertinent in this case. The acts of Congress passed on in *Kohl v. United States*, as we have seen, provided for the appropriation of a site for a public building by purchase or by condemnation. By the act of 1866 power of condemnation is not given, and, of course, methods of procedure are not involved in its construction.

It is equally unnecessary to consider the questions which might arise if the state of New Jersey gave the right of eminent domain to the telegraph company. It is conceded by counsel that such right does not exist, and it happens that under the policy of New Jersey the right of way of the railroad company enjoys in that state immunity from compulsory proceedings instituted by the telegraph company. But this has no bearing on the act of 1866, nor does it make that act, as construed by us, a grant to railroads of greater power over commercial intercourse by telegraph than the states have. Indeed, we think, a comparison between the states and railroads in that regard is misleading, and overlooks the essential difference between restraints on the legislative power of the states and the rights of property.

On account of those restraints, it may be, and finding no impediment in the rights of property, interstate commerce by

Louisville & N. Terminal Co. v. Lellyett

telegraph has marched to a splendid development, although in the acquisition of the means for its exercise it has relied on the consent of the owner of private property, or the power of eminent domain conferred by the states. We cannot but feel, therefore, that there is something inadequate in the argument which is based on the apprehension that the act of July 24, 1866, construed as we construe it gives a sinister power to railroad companies. It gives no power to those companies but that which appertains to the ownership of their property.

Decree affirmed.

LOUISVILLE & N. TERMINAL CO. et al. v. LELLYETT.

(Supreme Court of Tennessee, March 25, 1905.)

[85 S. W. Rep. 881.]

Terminal Yard—Location—Adjoining Property—Injuries to Use—Right of Action.

Where plaintiff held title to certain real property as trustee, he was entitled to sue, as trustee, for his cestuis, to recover damages to the use of their property, health, and comfort caused by defendant's alleged improper use and maintenance of a railroad terminal yard and its accessories near the same.

Same—Same—Same—Same—Misjoinder of Causes of Action.

Where, in an action against certain railroads for injuries to the use of certain real estate caused by the improper maintenance and use of defendant's railroad terminal, there was no claim for damages for sickness of members of plaintiff's family, doctor's bills, etc., and an allegation in the declaration of impairment of health of plaintiff's family was merely a specification of damage done to his residence as a home, for the purpose of showing that the presence of smoke, cinders, etc., rendered the place unhealthy, uncomfortable, and unsuitable for residence purposes, the declaration was not objectionable for misjoinder of causes of action for injury to the health of plaintiff's wife and children.

Damages—Permanent Distinguished from Recurrent—Instruction.

Where, in an action by an adjoining property owner against certain railroads for misuse of certain terminal facilities, the court, at plaintiff's request, charged that he could not recover for injury to the fee, and that the proof of the value of the premises must be considered only in determining the question whether the comfortable enjoyment of the premises had been impaired or destroyed, such instruction eliminated causes of action alleged to recover permanent, as distinguished from recurrent, damages.

Terminal Facilities—Location—Adjoining Property—Injuries to Use—Liability.*

Where certain railroads were authorized by legislative charter to locate and maintain certain terminal yards, roundhouses, etc., the exact location thereof not being prescribed, they were not authorized to so locate such facilities as to seriously impair or destroy the use of adjoining property.

Same—Same—Same—Same—Elements of Damages.

Railroad tracks were laid in front of plaintiff's property, and about 225 feet therefrom, in 1851, and the entire traffic of certain railroads passed over the same. As traffic increased, other tracks were laid into and through the station in the city where such property was located.

*See note at end of case.

Louisville & N. Terminal Co. v. Lellyett

At the time the first tracks were laid, plaintiff's property, as well as that contiguous thereto, was vacant; but after the erection of plaintiff's house a terminal corporation was organized by the railroads in 1900, and a roundhouse, sandhouse, coalsheds, bins, and a large number of tracks used for switching were constructed near plaintiff's property, which greatly impaired the value of its use: *held*, that plaintiff was not entitled to recover damages incident to the increase of traffic into and through the station, and could only recover for injury caused by the roundhouses, coal sheds, etc., and the switchyards and tracks necessary to operate them.

Same—Same—Same—Nuisance—Measure of Damages.

Where it was claimed that defendant railroad companies carelessly and negligently operated their property so as to make it a nuisance to plaintiff's adjoining residence, the measure of damages was the injury to the value of the use and enjoyment, measured largely by the diminished rental value of the property.

Same—Same—Same—Measure of Damages.

Where it was claimed that the location and maintenance of railroad terminal facilities by defendant near plaintiff's property caused actionable injury thereto, though such terminal facilities were carefully operated, plaintiff's measure of damages was the injury to the fee or permanent value of the property by the permanent operation of such terminal facilities.

Excessive Verdict.

Where, in an action for injury to the use of plaintiff's property by the operation of railroad terminal facilities by defendant, it appeared that plaintiff's property was worth but \$7,000, a verdict awarding plaintiff \$4,000 for injury to such use for a period of 32 months was grossly excessive.

Appeal from Circuit Court, Davidson County; J. A. Cartwright, Judge.

Action by John T. Lellyett, trustee, against the Louisville & Nashville Terminal Company and others. From a judgment in favor of plaintiff, defendants prosecute an appeal in the nature of a writ of error. *Reversed*.

James C. Bradford, Smith & Maddin, and Slemmons & Barthell, for appellants Terminal Co.

Walter Stokes and Geo. A. Frazer, for appellee.

WILKES, J. This is an appeal in the nature of a writ of error from a judgment against the Louisville & Nashville Railroad Company, the Nashville, Chattanooga & St. Louis Railway, and the Louisville & Nashville Terminal Company for \$4,000 for alleged injuries from smoke, soot, dust, and noise claimed to be due to the operation of the railroad and terminal yards, roundhouses, etc., at Nashville, Tenn.

The cause was tried before the Honorable J. A. Cartwright, circuit judge, and a jury. A motion for a new trial was duly made and overruled. A motion in arrest of judgment was then made and overruled. Due and proper exception was taken to the action of the court, and an appeal was prayed to this court.

The writ was issued on August 25, 1902, and required the defendants "to answer John T. Lellyett, trustee, and next friend of Mary R., Mary Frances, and Catherine Lellyett in

an action for damages in the sum of ten thousand dollars."

The declaration contains six counts.

The first count alleges that when "he [the plaintiff] became the owner of said property, and up to the time of the location of the terminal station and occupation thereof by defendants, said property was exceedingly valuable; the neighborhood was quiet, free from noise, smoke, and soot, and unpleasant gases, and in every way a desirable place to reside; that, owing to its location aforesaid, and its freedom at the time from noise, dust, soot, smoke, and noxious gases, plaintiff had beautified said place with shrubbery, trees, grass, and flowers, which would enhance the value of aforesaid property intended for residence purposes."

The declaration then proceeds to state that the terminal company was chartered and authorized to erect a terminal station in Nashville, and did erect the same; that afterwards, under some arrangement with the defendant companies, they have been in the use, operation, and occupation of the same; that the terminal yards or grounds lie in close proximity to the plaintiff's property, and defendants have constructed large numbers of tracks thereon, and operate a large number of engines and cars over them; that the noise from the engines and cars is unreasonable and constant day and night; that the defendant companies use a cheap and low grade of soft coal in their engines which emit volumes of black dirty smoke, defiling everything with which it comes in contact, which is due to the negligence of defendants in the operation of their engines; that the engines emit poisonous and noxious gases, which often lie over plaintiff's property like a pall; that defendants negligently erected, in close proximity to plaintiff's property, large coal bins or chutes, upon which thousands of cars of coal are dumped from a high elevation, causing dust and dirt to arise therefrom, which pass over and settle on plaintiff's property; that defendants have erected a large roundhouse, with a number of pipes or smokestacks, where they fire up and cool off engines, some of which are permitted to remain in said house an unreasonable length of time, and from the smokestacks of which roundhouse the smoke passes over to and settles on the plaintiff's property; that plaintiff's property is not worth near as much as it was before the erection of said depot and terminal station, and said decrease has been owing to the wrongful acts of defendants; that said smoke, soot, creosote, cinders, dust, and gases have permanently reduced and injured the value of plaintiff's realty, and have destroyed plaintiff's shrubbery, trees, grass, and flowers; and that plaintiff has been damaged the sum of \$10,000.

The second count is substantially the same as the first, except that it alleges damage to "his household furniture, ornaments, silver, and such articles," and that the smoke settles upon plaintiff's house and injures his personal property.

Louisville & N. Terminal Co. v. Lellyett

The third count alleges the same as the first count, but the damage claimed is for injury to the health of his family.

The fourth count alleges the same facts, and the damages claimed are for permanent injury to the property.

The fifth count alleges the same facts, and avers damage as follows: "Thereby damaging and injuring the furniture, hangings, fixtures, carpets, and property of the plaintiff and his family, ruining and destroying its use by the plaintiff and his family, to his damage ten thousand dollars."

The sixth count alleges similar facts, and claims damages as follows: "And that their result is to destroy the health, peace, comfort, and happiness of his family, and that their peace, health, comfort, and happiness have been injured and destroyed by said reckless, careless, negligent, and willful conduct, to the extent of ten thousand dollars."

The defendants demurred on three grounds:

First. Because of misjoinder of parties and misjoinder of causes of action, in that the suit was for damages for permanent reduction of the value of the property and for damage to the household furniture, and that the smoke and soot had been carried into the systems of the plaintiff and his family, whereby their health was greatly injured; that the plaintiff, as trustee and next friend, cannot sue for injury to the real estate in the same action in which he sues for injury to the health of the parties for whom he is trustee and next friend; that the plaintiff's ownership of the property is joint, and the injury to the health of the plaintiffs is several.

Second. That the declaration is insufficient in law, because it is uncertain, indefinite, and ambiguous.

Third. For misjoinder in causes of action in suing for permanent decrease in the value of real estate, and also for injury to personal property, household furniture, and for loss of personal comfort and of health.

Identical demurrers were filed by all the defendants.

The court sustained the demurrers as to the claim for damages to the plaintiff, John T. Lellyett, individually. In all other respects the demurrers were overruled, to which due exception was taken.

The defendants filed pleas raising the same questions.

The defendants' first plea was the general issue—not guilty.

The second plea was a special plea in which the defendant companies' charters were averred. The plea then further alleged that, when the company's road was first built, Nashville was a village with few inhabitants; that the property on which plaintiff's residence is now situated was vacant; that defendants' shops and terminal facilities were located at the extreme western edge of the town, and that the only feasible location for them was there; that they continued to operate said shops and terminal facilities at such point until the town increased in size, and there was an absolute ne-

cessity for larger shops, depots, bigger grounds and terminal facilities, and for new depots for passengers and freight; that, pursuant to this demand, the city of Nashville, a number of years ago, authorized the closing up of certain streets and alleys, and later on the raising of certain streets and the building of certain overheard bridges; that the city itself spent large sums of money in making these improvements; that, in order to furnish a suitable depot and terminal facilities, the railroads entering Nashville co-operated; that the public business increased, and thus increased the operations in the terminal yards; that the erections complained of were built pursuant to lawful powers, and that the damages complained of are such as are suffered by all persons who live in a city which grows and expands, and who happen to reside near any coal-burning concern that cannot move from place to place; that the location was determined by public necessity and convenience and the demands of commerce, as well as by charter rights; and that the original road was built long before plaintiff's residence was erected, and the proximity of its depots and yards to plaintiff's house has come about by reason of necessary expansion in serving the public.

The third plea was that the topography of the city of Nashville rendered any other location impracticable.

The fourth plea was based upon the public convenience and public necessity for locating the terminal facilities within reasonable reach of the public.

The fifth plea recited the charter of the Nashville & Chattanooga Railroad, and the original location of its road where the present tracks are situated; the original charter of the Louisville & Nashville Railroad Company; the construction of its railroad into Tennessee; its extension from its original depot, on the west bank of the Cumberland river, through the territory now occupied, and past plaintiff's residence; the original charter of the Tennessee & Alabama Railroad, the Nashville & Northwestern Railroad, the Nashville & Decatur Railroad, and other lines extending into Nashville, and their ultimate connections through Nashville and along the tracks now used for terminal purposes near plaintiff's residence; the charter of the Louisville & Nashville Terminal Company, and its construction of the terminal facilities, and its lease to the two railroads. The plea further averred that the present terminal facilities were built in order to serve the public and to meet at public demand, and that they are operated solely by the railroad companies, and not by the terminal company; that in said operations said companies used machinery and engines manned by suitable, competent, and skilled employees, and burn the same coal which has been used by railroads in this section since long before the plaintiff became the owner of the property which he claims is injured; the soft coal is the only practicable fuel in the South, and that de-

fendants make no more smoke, noise, dust, ashes, etc., than arise from a reasonably skillful and careful operation of their business; that plaintiff acquired the same property, for the alleged injury of which damages are claimed, when defendants were already operating many engines and trains, and doing a large amount of switching upon their own premises in the necessary transaction of their business, and that the additional smoke, etc., is due to the increased traffic rendered necessary by service to the public; that the location of the yards and terminal facilities was the most reasonable and practicable location to be found, considering the necessities of the public as well as the railroad companies; that defendants rely upon their charter rights for locating and operating their depots, roundhouses, shops, and other terminal facilities, and for operating and running trains in said yards.

The defendants also filed pleas of the statute of limitations of one and three years.

They also filed a plea known in this record as the "John Doe Plea," which is that this property and the plaintiff's property were originally owned by one John Doe, who, for a consideration, conveyed the property now owned by the railroad companies, and over which these operations are had, to the railroad companies, etc. But no proof was introduced under this plea, and it was stricken out.

Plaintiff joined issue on all the pleas except the last named.

The evidence on behalf of the plaintiff tended to show that, at the time he acquired this property, Gowdy street was a quiet street, suited for residence purposes; that there was no unusual noise, and no unusual amount of dust, dirt, and cinders; and that it was a comfortable place to live.

That the coal chutes complained of are used for dumping coal from cars into bins, to be used in firing engines; that the cars are hauled up on an inclined trestle, from which the dumping is done.

That the roundhouse had some 10 or 12 stacks, running up about 40 feet into the air.

That there is a sand or dry house in the yards; that in the terminal operations, trains are made up in the yards, and the switching and operations of engines and cars are practically constant; that coal is dumped day and night and on Sunday.

That the switch engines move forward and backward continually, and frequently stop opposite plaintiff's house, and the noise and smoke from them come directly to his house.

That the first discomfort he experienced on account of the smoke, noise, etc., was after the terminal yard opened.

That his family consists of his wife and three children, and they suffer from these discomforts proceeding from the terminal yards.

That as many as 12 or 15 engines can be seen in the yards at one time, and, when the smoke from these comes over his

premises, he can smell it. Sometimes it is impregnated with gas and causes coughing. In the summer time the front windows of his house cannot be opened for any length of time without experiencing trouble from cinders, soot, and smoke.

The furnishings in the house belong to his wife, and he holds the house as trustee for his wife and children, under a deed to him from his mother. He valued the entire property at \$7,000 and furniture at \$1,500.

There was evidence tending to show that the grass, trees, shrubbery, and flowers in the vicinity died, and that the smoke, soot, and noises were unpleasant, and they disturbed the sleep of himself and family, and damaged both the house and its furniture and furnishings; that there was considerable noise from the ringing of engine bells, but the whistle was seldom blown.

That the plaintiff has been in the habit of taking his family to the country in the summer, leaving the city the 1st of June, and remaining away until in September.

That the noises from the terminal yards had a tendency to disturb the nervous system, and were disturbing to visitors, but one would get accustomed to it, though at the expense of nervous force.

The defendants introduced in evidence the charters of the several railroads composing the lines using these yards for terminal purposes, and also the charter of the Louisville & Nashville Terminal Company, which constructed the yards and leased them to the two railroad companies, together with the lease itself, the ordinance of the city of Nashville, and the contract between the city and the terminal company for the construction and operation of the yards.

It is not necessary to refer to these charters, leases, consolidations, and connections more in detail.

Owing to the immense growth in travel and traffic, it was deemed advisable and necessary, for the benefit and convenience of the public, to provide new and enlarged terminal facilities at Nashville; and a lot was selected, centrally and conveniently located on Broad street, and embracing something like 100 acres, upon which was erected a passenger station house and a roundhouse, and coal chutes and bins, and a sandhouse, and a large number of tracks, used for switching and other purposes. This was in 1900.

Engines and cars have been operated since 1851 within 225 feet of the front of Mr. Lellyett's house, upon tracks that still are used, and are a part of the terminal facilities.

None of the tracks or houses erected under the terminal station plant are nearer to Mr. Lellyett's house than these original tracks; the new and additional tracks being to the west of the original tracks, and further removed from Mr. Lellyett's location.

On the west side of Gowdy street, opposite Mr. Lellyett's house, and between it and the terminal yards, are a number

Louisville & N. Terminal Co. v. Lelleyett

of houses, almost every lot being built upon, so that the smoke, dust, cinders, and noise must pass over these before reaching him.

From Mr. Lelleyett's house to the nearest point of the roundhouse is 750 feet; to the center of the roundhouse, 950 feet; and to the most distant wall of the roundhouse is 1,100 feet.

From Mr. Lelleyett's house to the nearest point of the coal chutes on Kayne avenue was 700 feet, and the further end of the coal chutes 800 feet.

From his house to the coal bins on Gleaves street, at the nearest point, was 1,150 feet, while the farthermost point was over 1,200.

From his house to the sandhouse was between 1,100 and 1,200.

The yard space between his house and these sandhouses and coal chutes is occupied by tracks used for incoming and outgoing trains, and for switching and yard purposes.

Defendants' evidence also showed that there were operated in the terminal yards 17 engines in the daytime, and 10 of these engines at night. Only 3 or 4 of these engines, however, operated continually in that part of the yard opposite Gowdy street, the balance of them, being assigned to different locations—some working in South Nashville, some in West Nashville or New Town, some in East Nashville, and others north of the Broad Street Viaduct—would only come into the terminal yards for a little while at a time, and at perhaps long intervals.

These three or four engines which worked opposite Gowdy street, and consequently opposite Mr. Lelleyett's house, were engaged mostly in hauling passenger trains. They used about 400 to 500 bushels of coal, in all, in 24 hours.

The evidence showed that the terminal yards began operations in January or February, 1900. This suit was brought August 25, 1902, about 32 months after the terminals began operations.

During this time, according to Mr. Lelleyett's evidence, he had been absent from the city, with his family, from the middle of June to about the middle of September each summer. Deducting these periods of time he was away, it would appear that he and his family were in their residence about 24 months.

The case was submitted to the jury under a charge of the court, and a verdict was rendered against the defendants for \$4,000. Under this charge, no damages were awarded for injuries to the fee, and all damages to the furniture were, at plaintiff's request, withdrawn. Hence this verdict must be taken as damage to the value of the use of the property, and other elements alleged in the declaration.

The defendants have appealed to this court, and assigned errors—29 in number.

The first error assigned is that there is no evidence to support the verdict.

Under this assignment it is insisted that the suit is brought in the name of Jno. T. Lellyett, trustee and next friend for Mary R., Mary Frances, and Catherine Lellyett; while there is nothing in the several counts and allegations to indicate that the suit is brought for the use and benefit of any one, except Jno. T. Lellyett, individually, and that the word, "trustee," annexed to his name, is merely *descriptio personæ*; while the proof shows that the title to the property is in Jno. T. Lellyett, trustee, for the use and benefit of his wife and two children, the parties named in the summons; and hence there is a variance between the allegations and proof of title, which is fatal to the action.

We think this objection not well taken, and that it sufficiently appears that Mr. Lellyett was trustee for his wife and children, and the suit was brought for damages to the use of their property, health, and comfort.

The second assignment of error is that there is a misjoinder of parties and causes of action.

The insistence is that there are five distinct and separate causes of action stated in the declaration, to wit:

First, a joint cause of action for damages to the real estate.

Second, a separate cause of action to Jno. T. Lellyett for damages to his furniture.

Third, fourth, and fifth, separate causes of action in favor of the wife and two children for injury to their health.

In regard to this assignment, it is only necessary to say that all claim for damages to personal property of Jno. T. Lellyett was abandoned, and the jury was so instructed, and this was not embraced as one of the elements of damages in the charge of the trial judge.

As to what are styled the third, fourth, and fifth causes of action, we think the assignment and criticism made is not well founded. There is no claims for damages for sickness, doctor's bill, etc. The allegation of impairment to health of the family is merely a specification of the damage done the place as a home or place of residence, just as is the destruction of the grass, trees, shrubbery, etc., and the presence of smoke, cinders, etc.

In other words, the averment is directed to the damage to the use of the property, and this damage consists in its being rendered unhealthy, uncomfortable and unsuitable for residence purposes.

In the charge of the court the jury were not instructed to give any damages for sickness or impairment of health of any of the family, but it was omitted, and the jury could not have given any damages for sickness or impairment of health, separate and apart from the damage done the property as a comfortable, healthy, and suitable place of residence.

The damages for which recovery was directed to be given

Louisville & N. Terminal Co. v. Lellyett

by the charge was "to the use, comfort, peace, quiet, and enjoyment of the house and lot," and health and sickness are not referred to in that part of the charge relating to the measure of damages.

We think, therefore, that there was no separate cause of action recovered upon for sickness or impairment of health.

We think it well to analyze the pleadings and see what issues are properly before us, and see whether there were issues submitted to the jury which were not warranted under the pleadings.

The first count in the declaration sues for permanent injury and impairment to the value of the premises of complainant.

So, with the fourth count, the damage claimed is to the permanent injury to the property.

Now, the court charged the jury, at plaintiff's request, that the plaintiff could not recover for the injury done the fee of the premises, and any proof adduced as to the value of the premises, if such there be, must be considered only in determining the question as to whether or not the comfortable use and enjoyment of the premises had been impaired or destroyed.

This instruction by the trial judge was made at the request of the plaintiff, but really it is immaterial whether the charge was given at plaintiff's request or on motion of the court.

This instruction eliminates the first and fourth counts, since they claim for permanent, and not recurrent, damages.

These two counts must be eliminated, therefore, from our consideration, as not presenting the issues upon which the case was tried and damages found.

The second and fifth counts are for damages to the furniture and fixtures in the house, and these are eliminated because all claim for damages on this account was withdrawn by the plaintiff.

This leaves only the third and sixth counts not eliminated, and these counts claim damages for injury to the use and enjoyment of the premises as a home.

The third count states the wrongful act to be that the plaintiff's place has been changed from a quiet, restful home into an unhealthy, noisy, dirty, filthy place, which has greatly injured the health of plaintiff's family; and the sixth count states the wrongful act to be the injury and destruction of the health, peace, comfort, and happiness of the family; and upon these counts the verdict must be sustained, if at all.

The question before us is, therefore, whether the use and enjoyment of the property of plaintiff has been materially impaired by the acts of defendants, and, if so, are the defendants liable therefor?

There can be no question but that some detriment has been done to the use and enjoyment of the property. The evidence in the record leaves no ground for doubt as to this

feature, but to what extent, we will consider more at length.

Defendants do not seriously contend that they are not the parties who have caused this damage, but the contention is that they are not liable for the same.

The argument is that the defendants have authority under their charters to locate the terminal yards, roundhouse, etc., where they have placed them, and, while the exact location of these things is not prescribed by the charter, the defendants had the legislative discretion to locate them where it would be most convenient to them and the traveling public.

Concede, for the sake of argument, that this is true (and within certain limitations it is), still the question remains, if such location result in material damage to adjacent or contiguous owners, are the defendants liable? And this proposition presents the real controversy so far as the merits are concerned.

While there are many criticisms of the charge so far as it relates to this question, they are crystalized in the exception to the following part of the charge:

"I instruct you that it is no defense to this action to prove that the yards where the business of defendants is carried on is at a suitable locality, or that the business is a lawful business and one useful to the public, or that the best and most approved appliances and methods are used in the conduct and management of the business. Where a trade or business is carried on in such manner as to interfere with the reasonable and comfortable enjoyment of another of his property, or which occasions material injury to the property itself, it amounts to a wrong to the neighbor, and one for which an action will lie."

This portion of the charge is taken from the opinion of the Court of Chancery Appeals in the case of *Ducktown, etc., v. Barns*, 60 S. W. 600, which was, as to its result, approved by this court, and to some extent followed in the case of *Swain v. Tenn. Copper Co.*, 111 Tenn. 437, 78 S. W. 93.

As further bearing directly upon the question of liability, and meeting the criticism of defendants' counsel, the court charged:

"I charge you, gentlemen, that, under the charter of the defendants and the contract with the city of Nashville, the state has not authorized the wrong complained of. In locating the yards and the various structures thereon so that injury necessarily resulted to adjacent landowners, the defendants acted at their peril. In locating the terminal yards the defendants stood on the footing of an individual, and were entitled to no superior rights of immunity by legislative authority. The authority to construct the yards did not authorize defendants to place them wherever they might think proper in the city, without reference to the property rights of others. Defendants have no right to use the yards in disregard of the rights of others, and with immunity for their invasion.

Louisville & N. Terminal Co. v. Lellyett

"If you find from the evidence that the terminal yards are located in or adjacent to a residence neighborhood, and that in their operation the defendants make noises which, because of their volume, character, proximity, or unreasonableness, cause plaintiff material distress, discomfort, or injury, then, in that case, the defendants are liable. It is no defense that such noises are necessary to the operation of defendants' business, its location, manner in which it is conducted, the hours of its operation, character and volume of the noises, reasonableness or unreasonableness of the hours during which such noises are made, and all other attendant circumstances.

"I further charge you and instruct you, gentlemen, that neither is it any defense that when the nuisance was established it was in a convenient place, and that the public had come to the nuisance either by the extension of the town or the operating of highways and streets.

"The fact that the business was originally established in a convenient place, but that the public has come to it, is no defense."

The Legislature may authorize public corporations and quasi public corporations to take private property for public use.

Thus, it may authorize a railroad to take private property for its right of way, for its depots and station houses.

It may also authorize terminal companies to take private property for its station houses, roundhouses, coal chutes, and other necessary conveniences; but it cannot authorize such public corporations, in locating such works, to seriously impair or destroy property not so taken, but which becomes impaired or is destroyed by the use of that which is taken.

There is no authority for the commission of a nuisance, or the doing of a hurtful act, to adjacent or contiguous property, in order to operate that which it lawfully has.

This question, we think, has already been decided in this state in a number of cases.

In Terminal Company v. Jacobs, 109 Tenn. 741, 72 S. W. 957, 61 L. R. A. 188, which involved the location and construction of a roundhouse by this same terminal company, it is said:

"To claim exemption from a liability resting on a charter right, the answer may be properly made that the state has not authorized the wrong complained of, and, in locating its roundhouse so that the injury necessarily resulted to the adjacent landowner, it did so at its peril."

It appears to be the English doctrine that Parliament may authorize the construction of such a work at a specified place where its use would constitute a nuisance at common law, and no compensation could be claimed in respect to an injury to private rights, apart from a negligent use.

But, even under the English system, no such immunity could be claimed, unless there was sanction to do so, either express or implied.

As is said in *Hill v. Managers of the Metropolitan Asylum Dist.*, L. R. 4 Queen's Bench Div. 433:

"When the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put in execution or not, I think the fair inference is that the Legislature intended that the discretion be exercised in strict conformity with private rights, and did not intend to confer license to commit a nuisance in any place which might be selected for the purpose."

This court, approving this doctrine, said, in addition, in *Terminal Company v. Jacobs*, 109 Tenn. 743, 72 S. W. 957. 61 L. R. A. 188:

"But over and beyond this, we think this corporation, in selecting a place for its roundhouse, acted in a private capacity, and is responsible for the injurious consequences which may result from its use. This is the view taken in *Baseman v. Penn. R. R. Co.* (N. J. Sup.) 13 Atl. 167. It is there said: 'A railroad, in selecting a place for repair shops and engine house, acts altogether in its private capacity. Such location is a matter of indifference to the public. Consequently, with respect to such act, the corporation stood on the footing of an individual, and was entitled to no superior rights of immunity. * * * The authority to construct such works did not authorize it to place them wherever it might think proper in the city, without reference to the property rights of others. Grants of power to corporate bodies like these can give no license to use them in disregard of the rights of others, and with immunity for their invasion.' To the like effect is the leading case of *B. & P. R. R. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739; *Cogswell v. N. Y., H. & H. R. R. Co.*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701."

The *Fifth Baptist Church Case*, which is a leading case upon this question, has been cited and approved in a large number of cases, and by all the text-books and compilations, since it was delivered in 1883.

It is said that it is weakened in the case of *London Railway Company v. Truman*, 11 App. Cas. 50, but we do not find this to be so; but that case, by the opinion of the court itself, is differentiated from the *Hill Case* and the *Church Case*, the *Truman Case* resting upon the English railway acts, which were assumed to establish the proposition that a railway might be made and used, whether it was a nuisance or not.

The *Truman Case* is contrary to the other cases, because it is based upon the authority of the English railway acts, which authorize the construction and operation of the railway, even though it be a nuisance. No such legislation has ever been attempted in the United States, and it is so utterly repugnant to our Constitution and system of govern-

ment, by which the rights of every individual are protected, that it will never be attempted or upheld.

In the Fifth Baptist Church Case, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, it is said:

"It is no answer to the action of the plaintiff that the railroad company was authorized by act of Congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop in question were thus necessary and expedient, that they are skillfully constructed, that the chimneys of the engine house are higher than required by the building regulations of the city, and that as little smoke and noise are caused as the nature of the business in them will permit.

"In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol, or in the most densely populated locality. Indeed, the corporation does assert a right to place its works upon property it may acquire anywhere in the city."

"Whatever the extent of the authority conferred, it was accompanied with this implied qualification: that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others of their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred." 108 U. S. 317, 2 Sup. Ct. 727, 27 L. Ed. 744.

And again, page 745 of 27 L. Ed., page 729 of 2 Sup. Ct., 108 U. S. 317:

"The acts that Legislature may authorize, which without such authorization would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest, and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the state; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

And again, page 745 of 27 L. Ed., page 730 of 2 Sup. Ct., 108 U. S. 317:

"If, as asserted by the defendant, the noise, smoke, and

odors which are the cause of the discomfort and annoyance to the plaintiff are no more than must necessarily arise from the nature of the business carried on with an engine house and workshop as ordinarily constructed, then the engine house and workshop should be so remodeled and changed in their structure as to prevent, if that be possible, the nuisance complained of, and, if that be not possible, they should be removed to some other place, where by their use the plaintiff would not be thus annoyed and disturbed in the enjoyment of its property. There are many places in the city sufficiently distant from the church to avoid all cause of complaint, and yet sufficiently near the station of the company to answer its purposes."

To the same effect is the case of *Chicago, Gr. W. R. Co. v. Methodist Church*, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488, citing *Stevens v. New York Elev. R. Co.*, 8 N. Y. Supp. 313; *Lahr v. Metropolitan Eve. R. Co.*, 104 N. Y. 268, 10 N. E. 528; *Kane v. New York Elev. R. Co.*, 125 N. Y. 186, 26 N. E. 278, 11 L. R. A. 640; *Drucker v. Manhattan R. Co.*, 106 N. Y. 157, 12 N. E. 568, 60 Am. Rep. 437; *Duyckinck v. New York Elev. R. Co.*, 125 N. Y. 710, 26 N. E. 755; *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; *Peyser v. Metropolitan Elev. Co.*, 13 Daly, 122; *Smith v. New York Elev. R. Co.*, 18 N. Y. Supp. 132; *Bohm v. Metropolitan Elev. R. Co.*, 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344.

The same doctrine is laid down in *Cum. Tel. Co. v. United Electric Ry. Co.*, 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236. In that case this court quoted approvingly the case of *Hudson River Tel. Co. v. Turnpike Co.*, 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674, 31 Am. St. Rep. 838, which said:

"We are not prepared to hold that a person, even in the prosecution of a lawful trade or business upon its own land, can gather there, by artificial means, a natural element like electricity, and discharge it in such volume that, owing to the conductive properties of the earth, it will be conveyed upon the grounds of his neighbor with such force and to such an extent as to break up his business or impair the value of his property, and not be held responsible for the resulting injury."

Again, on pages 520, 521, of 93 Tenn., page 111 of 29 S. W. (27 L. R. A. 236):

"The important consideration is that a thing of value has been taken from the plaintiff for the benefit of defendant as the representative of the public, and for that thing compensation must be made. It is a plain dictate of justice that the public, not the individual citizen, should bear the burden imposed upon the private property for the public benefit. That defendant's acts may have been authorized and lawful can make no difference. The Legislature has not the power (except, perhaps, as to corporate franchises) to authorize, and

in this case it has not undertaken to authorize, the taking of private property for a public use without compensation."

In *Booth v. Ry.*, 140 N. Y. 272, 35 N. E. 593, 24 L. R. A. 105, 37 Am. St. Rep. 552, it is said:

"But while there are decisions which give countenance to the view that an authority conferred upon a railroad corporation to construct a railroad, carries with it immunity from liability in executing the work for consequential damages to private property, to the same extent as pertains to the sovereign in executing public works (*Bellinger v. N. Y. C. R. R. Co.*, 23 N. Y. 42), it is now the settled doctrine in this state that the powers granted to such corporations are to be construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights, and under the same responsibility as though the acts done in execution of such powers were done by an individual. *Cogswell v. N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701. This doctrine accords with reason and with the presumed intention of the Legislature. The franchises of a railroad corporation are conferred in consideration of supposed public benefits which will result from the construction of its road. The projectors of such an enterprise are moved by considerations of personal advantage. To acquire corporate character and privileges, they are willing to subject themselves to certain public duties. But it is quite unreasonable that in executing its corporate powers the corporation should be exempted from liability for injuries to private property, as though it was acting as a strictly public agent."

See, also, *Long Island Ry. Co. v. Garvey*, 159 N. Y. 334, 54 N. E. 60.

In *Madison v. Ducktown, etc., Co.* (Tenn. Sup.) 83 S. W. 658, noxious fumes and smoke were found to be sufficient to constitute a nuisance. With reference to location and operation the court (page 660) said:

"The Court of Chancery Appeals finds that the defendants are conducting and have been conducting their business in a lawful way, without any purpose or desire to injure any of the complainants; that they have been and still are pursuing the only known method by which these plants can be operated and their business successfully carried on; that the open-air roast heat is the only method known to the business or to science by means of which copper ore of the character mined by the defendants can be reduced; that the defendants have made every effort to get rid of the smoke and noxious vapors, one of the defendants having spent \$200,000 in experiments to this end, but without result."

"It is to be inferred from the description of the locality that there is no place more remote to which the operations referred to could be transferred."

Louisville & N. Terminal Co. v. Lelleyett

And again (page 664 of 83 S. W.):

"A judgment for damages in this class of cases is a matter of absolute right, where injury is shown."

In view of these and many other authorities, we are of opinion that there was no error in the charge of the court, as claimed by the defendants, except as hereinafter indicated.

It remains to apply the principles laid down as determining liability to the facts of this case, with such criticisms and modifications as we think are proper under the facts.

As before stated, tracks were laid in front of the property in controversy, and about 225 feet from it, as early as 1851 or 1852; and the entire traffic and travel of the Nashville, Chattanooga & St. Louis Railway and Louisville & Nashville Railroad to and from the South passed over these tracks. With the increase of travel and traffic the cars have been caused to pass more frequently than when the roads first commenced operations; and other tracks have been laid entering into the terminal station, and passing through it, in order to accommodate the increase.

When the first tracks were laid, the property now in controversy, as well as that contiguous, was vacant. With the growth of the city this space has been occupied, and residences have been erected.

Thus both the travel and traffic of the roads, as well as the growth of the locality, have gone hand in hand.

We are of opinion that, in so far as the growth and increase of travel and traffic into and through the station has brought discomfort to plaintiff, he is without remedy.

In other words, the roads have the right to accommodate their increasing traffic and travel without liability, so long as their trains are operated without negligent disregard of the comfort and usable value of the plaintiff's property, and for this purpose to lay such additional tracks, side tracks, and switches into and through the station as may be required to accommodate such travel and traffic, both passenger and freight; and it is only for the additional conveniences of roundhouses, sandhouses, coal bins, coal chutes, and the switchyards and tracks necessary to operate such additional conveniences, which might be located elsewhere, though not so advantageously, perhaps, that plaintiff can complain, if they materially damage the plaintiff's property.

There has been no effort made to distinguish between the damage caused by the entrance of trains and passing of trains and exit of trains from the station and switching trains in operating the road, and the operation of the switch tracks, the coal bins, coal chutes, roundhouse, sandhouse, and other facilities introduced and operated as part of the terminal facilities.

It is only for the latter that plaintiff has a right of action, and proof should have been confined to that feature of the situation, and not to the general discomfort and damage

caused by the entering and departure of trains from the station, as well as the operation of the other facilities.

Again, it is not every inconvenience or discomfort that will entitle a property holder to damages, even though it be material or considerable, and especially as against a public or quasi public enterprise.

The noise of paved streets and of street cars is a material discomfort to abutting owners. The smoke from factories, hotels, and manufacturing establishments may form a material discomfort and annoyance to persons living near by; but these are discomforts and annoyances that the individual must bear in deference to the convenience and comfort of the public.

The noise of trains passing through the country districts and the dust of vehicles passing along the public highways may be a great annoyance to residents along the line of such roads; and the rumbling of carriages of belated revelers and of early market wagons along the paved highways may disturb the slumbers and harass the nerves of persons who desire to sleep in the cities; but it is not for such annoyances and discomforts that the law allows redress, but only where the discomfort and inconvenience proceeds to such an extent as to injure the usable and rental or permanent value of the property that the law will award damages. It must amount, to some extent, to the taking of the value of the property, either temporary or permanent, and depriving the owner thereof. See *R. R. v. Bingham*, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622; *Demarest v. Hardham*, 34 N. J. Eq. 469.

This distinction will, we think, tend to harmonize to a large extent cases which appear to be, and are, no doubt, somewhat in conflict with the case we have cited.

In other words, there are cases, some of them cited by counsel, which seem to hold that damages will not be awarded when they arise from the careful operation of lawful enterprises; but these cases, when carefully analyzed, do not present such a strong state of facts as shows a material injury to the property, amounting to a taking of it, in part or in whole; but they present cases where the inconvenience and damage do not amount to a nuisance, and, hence, being done in the prosecution of a legal, public business, they do not present a case for damages.

The liability of defendants is, we think, to be determined by the principles we have laid down; and it remains to consider the question of damages, if there is liability.

One assignment of error is that the damages are so excessive as to indicate passion, prejudice, or caprice.

In our opinion, there are two theories upon which damages might be estimated or based, if there is liability.

One is the theory that the defendants are carelessly and negligently operating their property so as to make it an unnecessary and unwarrantable and hurtful nuisance, while at the

same time they have it in their power to correct the evils and obviate the trouble by adopting other means, and being more careful in the manner of operating the yards; and coupled with this is the presumption that the nuisance will be only temporary, and the evil will be remedied.

In that aspect of the case recurrent damages to the use and enjoyment of the property may be recovered from time to time until the nuisance is abated.

In such case the measure of damages will be the injury to the value of the use and enjoyment, which may be measured, to a large extent, by the rental value of the property, and to what extent that rental value is diminished.

The other theory is that the yards, etc., are carefully and properly operated, so much so as can be done considering the use of the property; but the location of the yards, etc., and their proper operation nevertheless causes an actionable injury to the plaintiff's property. In such case it is not contemplated that any change in operation will be made, and the damage will continue so long as the yards are continued, which will be permanently.

In such case the proper measure of damages will be the injury to the fee or permanent value of the property by the continued and permanent operation of the yards. To the extent that such permanent injury is inflicted, the property is, in a sense, taken or appropriated.

The doctrine of successive suits rests upon the following principles:

- (1) That the act complained of is a nuisance.
- (2) That it may be abated or discontinued, and until that is done damages may be recovered from time to time.

This assumes that the nuisance will be abated, and that the cause of the injury is not permanent, nor intended to be so.

On the other hand, when the operation of the yards is lawful and reasonable, and the injury results from the location and necessary operation, and it is not contemplated to be removed or capable of being removed, then the damages are permanent, and they should be estimated on the permanent injury to the property in the depreciation of its value in the market.

Now, upon this feature the measure of damages in the record is in a very unsatisfactory condition.

The declaration in its different counts claims damages upon each theory; that is, some of the counts for damages for use and occupation, and others for damages to the value of the property. There were other counts alleging damages to the furniture.

Much proof was taken showing damages in a general way—that is, injury to the property, both real and personal; but there is very little, if any, estimate of salable value, and none of rental value or rental depreciation. It is not shown how much the rental or usable value has been diminished. It is

not shown, in definite estimates, how much the permanent value of the property has been depreciated.

The case was presented to the jury upon all the counts; that is, permanent damages to the property, temporary damages to the use, and damages to the furniture.

But when the court came to charge the jury all claims for damages to furniture were withdrawn; all claims for damages to the fee or permanent injury were, at plaintiff's request, withdrawn; and the case went to the jury alone upon the question of damages to the use and occupation—that is, to the rental or usable value of the real estate.

It must have been confusing to the jury to have the matter submitted to them in this way, requiring them to eliminate from their minds the damage to the personal property, and the permanent damage to the realty, and to consider only the injury to the rental value.

There is almost, if not an entire, absence of any basis for an estimate of the depreciation of the property in rental or usable value.

It was shown in the proof, over protest, that the value of the real estate was \$7,000. This was for the purpose of furnishing a basis for its rental or usable value, and was so confined; the argument being that the injury to the rental or usable value of \$7,000 would be more than that of a \$2,000, or less than that of a \$20,000.

In this condition of the record it is not improbable that the jury were misled into believing they could look to the injury to the personal property and the permanent injury to the property, whereas they could only look, as the case was finally submitted to them, to the damage to the use and enjoyment of the real property during the time the terminal property was being operated; that is, from January, 1900, to the bringing of the suit in 1902. This was a period of about thirty-two months, during about six of which plaintiff did not occupy the premises, but was away voluntarily for the summer.

The damage found was \$4,000. This, for the use of a property worth \$7,000, for only 32 months, would be grossly unreasonable for rental or usable value, even if the property was rendered uninhabitable.

It would be at the rate of \$2,000 per year for a property which, from its value, would, perhaps, rent for not more than \$500 per annum.

So that, if the plaintiff had lost the entire use or rent of his property, the amount found as damages therefore was grossly excessive, even taking into consideration, in addition to the rental, the destruction of the trees, flowers, shrubbery, etc.

Treating the case, as we must, upon the record, that only temporary damages were awarded, they are so excessive as to indicate either misapprehension by the jury or showing

Louisville & N. Terminal Co. v. Lelleyett

passion, prejudice, or caprice on their part, which must vitiate their verdict.

We have not been able to find in the record any evidence of the rental or usable value of the property.

There is no evidence to show what the property would have rented for before the terminal plant commenced operation, nor how much, if any, that rental value had been diminished.

Nor is there any evidence or estimates in figures of the permanent injury to the property, if that was to be considered.

Evidence was introduced to show that smoke, soot, cinders, dust, and noise were caused by other industries than those of the terminal company.

In regard to the several assignments on this feature of the case we are of opinion that it was competent to show that the property in controversy was injuriously or prejudicially affected by smoke, dust, cinders, etc., from other sources, but not to show the effect of same on property nearby or contiguous to the plaintiff's property.

Neither is it competent to show how other property contiguous to or near by that of plaintiff has been affected by the installation of and operation of the terminal plant, but the proof should be confined to the premises of plaintiff.

Nor is it competent to compare the noise existing at plaintiff's residence with that prevailing in other portions of the city; nor to show that Nashville, generally, is a dirty, smoky, noisy place or city.

Other minor errors are assigned, which it is not necessary to pass on specifically.

For the reasons we have indicated, the judgment of the court below must be reversed, and the cause remanded for a new trial. Appellee will pay costs of appeal.

Upon this new trial plaintiff should elect whether he will claim for temporary recurrent damages to his property in its use and rental value, or whether for permanent injury, and proof should be confined accordingly. So, also, all evidence as to damages to furniture should be eliminated, and not put before the jury. So, also, should the proof be limited to the damage caused by the operation of the roundhouse, sandhouse, coal chutes and bins, and the tracks used in operating the same, excluding such inconvenience and damage as arises from the operation of incoming or outgoing passenger and freight trains into the station, and the operation of such switches as are required to handle the same in entering or leaving the station. All other matters should be excluded from the jury as tending to confuse them.

In the present state of the record, we cannot say whether defendants are liable for any amount.

NOTE.

**NUISANCES—EFFECT OF LEGISLATIVE SANCTION, LAW-
FULNESS OF BUSINESS, AND EXERCISE OF
SKILL AND CARE.****I. Scope of Note.****II. Effect of Legislative Sanction.****A. In Actions by State.****1. Other Statements of Rule.****2. Illustrations.****a. Highways and Other Things over Which Public Has Control.****b. Railroads in Streets.****c. Abutment in Street—Elevated Railway.****i. Authorized Obstruction of Public Road.****z. Business Conducted in Proper Manner—Location Designated.****f. Bawdy House.****g. Works of Internal Improvement—Transfer to Private Corporation—Obstruction of Water—Health.****h. Dam—Specified Location and Height—Indictment.****i. Canal—Purchase from State—Seepage—Noisome Pools—Indictment.****j. Railroad in Street—Improper Use.****k. License to Manufacture Fertilizers.****3. Statute Must Be Strictly Construed.****4. Municipal Powers.****B. Private Nuisances.****1. Consequential Damages—Right Creature of Statute.****2. Compensation—Absence of Legislative Requirement.****3. Discomfort to Be Endured for Public Good.****4. Enjoyment of Property Not Directly Disturbed—No Right of Action.****5. Injuries from Acts Done in Conformity to Law—Forfeiture of Chartered Rights or Suit Authorized by Law.****6. Small Nuisances May Be Authorized.****7. Mill—Ringling Bell—Injunction—Subsequent Legislative Authority.****8. Street—Authorized Obstruction—Liability Limited by Principles Governing Actions of Negligence.****9. Public Work for Federal Government—Absence of Negligence—Liability of Contractor.****10. Public Improvement—Vessels Prevented from Entering Dock.****11. Dam to Improve Navigation—Destruction of Mill Site.****12. Consequential Damages Recovered—Work Not Subject to Abatement.****13. Slaughter House—Bar to Injunction in Advance.****14. Steam Engines and Furnaces—Compliance with Statute—Burden of Proof.****15. Steam Engine—Municipal License.****16. Injury Not Actionable at Common Law if Done by Individual—Compensation—Absence of Statutory Provision.****17. Telephone Wires—Lightning—Noise—Insurance—Public Interests—Injunction.****18. All Equities Considered.****19. Statutory Sanction Must Be Clear.****(1) Express Legislative Authority Required.****(2) Natural Result of Act Authorized—Result of Manner of Doing Act.****(3) Very Act Must Have Been Contemplated.**

Note

- (4) Permissive Authority—Acts Contemplated by Statute.
 - (5) Municipal Acts—Express Legislative Authority Required.
 - (6) Municipal Corporations—Legislative Authority Not to Be Inferred.
 - (7) Waterworks—Injury from Soot—Site Not Approved.
 - (8) Public Work for Private Profit—Compensation—Exemption—Presumption.
 - (9) Railroad in Highway—Authority to Construct—Injury to Private Property.
 - (10) Authority to Bring Tracks within City—Shops and Engine Houses.
 - (11) Engine House and Coal Bins—Soot and Smoke—Statute—Location Not Designated.
 - (12) Engine House—Compensation—General Grant of Authority—Presumption.
 - (13) Location of Roundhouse—Railroad Acts in Private Capacity.
 - (14) Switching—Dangerous Speed—Standing Trains—Cinders.
 - (15) Only Right of Way in Street Granted—Terminal Yard.
 - (16) Operation of Stationary Engine—Street Railways—Municipal License.
 - (17) License to Operate Steam Engine in City—Nuisance—Soot.
 - (18) Stationary Steam Engine—Noise—Vibration—License No Bar to Action.
 - (19) Pumping Station—Selection of Site Left to Municipality.
 - (20) Waterworks—Soot—Location and Character Not Specified.
 - (21) Massachusetts Mill Act—Limited Use of Land of Another.
 - (22) Sewers—Injuries to Lower Proprietors—Acts of Parliament—Authority Not Implied.
 - (23) Cleaning and Relighting Engines—Unreasonable Use—Injunction.
 - (24) Municipal Corporations—Acts Not Contemplated by Legislature.
20. Injuries to Private Property.
- (1) Other Statements of Rule.
 - (2) Special Damage from Public Nuisance.
 - (3) Sewers—Discomfort—Special Injury.
 - (4) Public Work for Private Profit—Corporation—Sovereign's Immunity.
 - (5) Private Wrongs.
 - (6) Corporations Acting for Private Profit—Compensation.
 - (7) Act Naturally Resulting in Injury to Private Property—Compensation—Legislative Intention—Presumption.
 - (8) Dam across Navigable Water—Overflowing Land—Damages.
 - (9) Injury Necessarily Resulting from Proper Construction—Absence of Charter Remedy.
 - (10) Noise and Confusion—Trains and Cars—Damages—Legislative Authority No Defense.
 - (11) Dam—Flowing Back upon Land—Injunction.
 - (12) Railroad Engine House and Repair Shops Located Near Church.

Note

- (13) Dam—Overflowing Land—Liability.
 - (14) Operation of Railroad—Noise—Nuisance—Legislative Authority No Defense.
 - (15) Noxious Vapors—Private as Well as Public Nuisance.
 - (16) Navigable Stream — Mining Debris — Lower Proprietors — Compensation — Constitutional Law.
 - (17) Canal—Flooding Land—Consequence of Lawful Act.
 - (18) Smoke, Noise and Vibration—Necessary Concomitants of Use of Franchise Distinguished from Private Wrongs.
 - (19) Consequential Damages—Not a Taking.
 - (20) Levees—Overflows—Not a Taking.
 - (21) Property “Injured”—Construction of Constitutional Provision.
21. Damages Must Be Special.
- a. General Rule.
 - (1) Absence of Special Injury.
 - (2) Unauthorized Occupation—Right of Citizen to Enjoin.
 - (3) Street Railway—Location on Portion of Street Not Designated.
 - b. Limitations of Rule.
 - (1) Coal Shed—Noise—Same Injury Sustained by Others.
 - (2) Smoke and Cinders—All Property in Vicinity Injured.
 - (3) Access to Cemetery—Injunction.
 - (4) Incidental Injuries—Frightening Horses.
 - (5) Smoke—Injuries to Many Others.
 - (6) Telephone Poles—Absence of Special Injury.
 - c. Noise—Case Must Be Very Special.
22. Railroads in Streets.
- a. Consequential Injuries from Operation.
 - (1) General Rule.
 - (2) Other Statements and Illustrations of General Rule.
 - (a) Mere Consequential Annoyance.
 - (b) Authorities Limiting Application of Rule.
 - b. Injuries from Construction of Railroads in Streets.
23. Consequential Injuries from Construction and Operation of Railroads on Land Other than Streets.
24. Unauthorized Construction and Operation of Railroad.
- a. General Rule.
 - b. Illustrations.
 - (1) Operation of Freight Cars on Street Railway Track without Authority—Injuries to Pedestrian.
 - (2) Unauthorized Uses Made of Licenses.
 - (3) Grant—Restriction for Benefit of Portion Retained—Elevated Railway—Injunction.
 - (4) Diversion of Stream—Work of Public Utility—Liability.
 - (5) Railroad in Street.
 - (6) Relocation of Road.
 - (7) Railroads—Unauthorized Location.
 - (8) Railroad in Street—Others Injured.
 - (9) Bridge over Navigable River—Construction—Departure from Terms of Federal Statute.
 - (10) Canal—Unauthorized Mode of Construction.

Note

(11) Cross-Over Switch—Location—Approved Plan Not Followed.

25. Whether Damages from Construction and Operation of Railroad Were Included in Condemnation Assessment or in the Consideration.

a. Damages Included.

(1) Elevation of Track—Increased Noise, Smoke and Cinders—Injury to Owner of Subsequently Purchased Lot.

(2) Grant of Land for Right of Way—Smoke, Cinders and Vibration—Injury to Other Portion of Lot.

(3) Grant of Right of Way—Injuries from Lawful Construction and Operation—Damages Included in Consideration.

(4) Switches and Turntables—Smoke—Necessary Incidents.

(5) Horse Railway—Contemplated Use.

(6) Grant of Right of Way—Damages Included in Consideration — Nonnegligent Construction and Operation.

(7) Proper Construction—Damages Included in Award.

(8) Excavation—Disappearance of Spring.

(9) Bridge—Incident to Grant.

(10) Watercourse—Unnecessary Diversion—Trespass —Damages Included in Assessment.

(11) Grant of Right of Way—Contingent Damages Included in Consideration.

(12) Injury to Private Ferry—All Damages Included in Assessment.

b. Damages Not Included.

(1) Unlawful Use of Right of Way—Damages Not Included in Original Assessment.

(2) Damages Included in Statutory Compensation—Unnecessary Injuries.

(3) Right of Way Acquired by Deed—Damages—Scope of Exemption—Negligence in Construction.

(4) Railroad—Incidental Damages Included in Assessment—Presumption—Negligence.

(5) Construction of Waterway—Damages Included in Compensation—Unnecessary Injuries.

(6) Diversion of Surface Water—Incident to Grant.

(7) Damages Included in Award or Release—Negligent Construction.

(8) Injury from Unskillful Construction.

(9) Statutory Compensation—Injuries from Negligence and Trespass Not Included—Surface Water.

III. Arising from Lawful Business.

A. General Rule.

B. Other Statements and Illustrations of Doctrine.

1. Illustrations.

a. Blacksmith Shops—Location.

b. Smoke—Noise—Odors Not Injurious to Health—Injunction.

c. Dense Smoke for Twelve Hours Twice a Month.

d. Manufactory—Subsequent Erection of Residence.

e. Noise—Slaughter House.

f. Offensive Odors Not Producing Disease.

Note

- g. Stable in City.
- h. Use of Steam Whistle.
- i. Distilling—Smoke and Noise.
- j. Lawful Business—Evidence Must Be Convincing.

IV. Effect of Exercise of Care and Skill.

- A. Lawful Business—Exercise of Care No Defense.
- B. Factory—Noxious Vapors—Exercise of Skill and Care.
- C. Use of Dangerous Materials.
- D. Stock Yards—Location—Good Faith—Exercise of Care—Injunction.
- E. Coal Bins—Necessary Location—Exercise of Care—Injunction.
- F. Smelting Works—Unwholesome Gases—Suitable Location and Proper Operation.

V. Effect of Negligence or Want of Skill.

- A. Sewers—Odors—Percolations Not a Taking—Damages—Action for Tort.
- B. Negligence in Construction or Operation of Railroad.
- C. Overflow of Water—Negligent Construction.
- D. Negligence in Use of Grant—Damages—Express Legislative Exemption.
- E. Terminal Yard—Improper Construction or Operation.
- F. Railroad—Must Be Necessary Result.
- G. Obligation Not to Injure Another—Maxim Applicable to Railroads—Negligence—Damages.
- H. Watercourse—Unnecessary Diversion—Cheaper Construction—Grant of Right of Way.

I. SCOPE OF NOTE.

The main purpose of this note is to show whether the authorized construction and operation of a railroad in a street may constitute such a nuisance as to entitle an owner of property abutting on the street to damages. It treats, however, of some other questions of the law of nuisance, and of some which, perhaps, belong more properly to that of eminent domain; but they all relate, in more or less degree, and tend to illustrate, our main subject.

II. EFFECT OF LEGISLATIVE SANCTION.

A. In Actions by State.

Of course it is a legal solicism to call that a public nuisance which is maintained under legislative authority. When the law making power has lawfully authorized a thing to be done no wrong can thereby arise except from the manner of doing the act. That which the law authorizes cannot be a public nuisance. And the legislature may, when deemed necessary for the public good, permit that to be done which would, on common-law principles, and without statutory authorization, be deemed a nuisance. So when an individual or a corporation is vested by the legislature with power to do such an act, and the authority conferred is properly exercised and not exceeded, the licensee cannot be held liable, in a suit by the state, for committing a public nuisance, in exercising the power granted.

UNITED STATES.—Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317.

INDIANA.—Butler *v.* State, 6 Ind. 165; City of North Vernon *v.* Voegler, 103 Ind. 314, 2 N. E. 821; Pittsburg, C. & St. Louis R. W. Co. *v.* Brown, 87 Ind. 45; State *v.* Louisville, etc., R. Co., 86 Ind. 114, 10 Am. & Eng. R. Cas. 286.

Note

- IOWA.—*Milburn v. City of Cedar Rapids*, 12 Iowa 246.
 KENTUCKY.—*Louisville Ry. Co. v. Foster*, 108 Ky. 743.
 LOUISIANA.—*Irwin v. Great So. Tel. Co.*, 37 La. Ann. 63.
 MARYLAND.—*Garrett v. Lake Roland Elevated Ry. Co. (Md.)*, 1 Am. & Eng. R. Cas., N. S., 385.
 MASSACHUSETTS.—*Commonwealth v. Boston*, 97 Mass. 555.
 MICHIGAN.—*Chope v. Detroit & Howell P. R. Co.*, 37 Mich. 197.
 MISSOURI.—*Givens v. Van Studdiford*, 86 Mo. 149.
 NEW JERSEY.—*Garrett v. State*, 49 N. J. L. 94, 7 Atl. 29; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75; *State v. City of Trenton*, 36 N. J. L. 79.
 NEW YORK.—*Baxter v. Spuyten Duyvil, etc., R. Co.*, 61 Barb. (N. Y.), 428; *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10, 8 N. E. 537, 27 Am. & Eng. R. Cas. 376.
 PENNSYLVANIA.—*Commonwealth v. Reed*, 34 Pa. St. 275; *Danville, etc., R. Co. v. Commonwealth*, 73 Pa. St. 29.
 RHODE ISLAND.—*State v. Barnes*, 20 R. I. 525, 40 Atl. 374.
 VIRGINIA.—*Town of Suffolk v. Parker*, 79 Va. 660.
 WEST VIRGINIA.—*Watson v. Fairmont & S. Ry. Co.*, 49 W. Va. 528, 39 S. E. 193.
 WISCONSIN.—*Stoughton v. State*, 5 Wis. 291.

1. Other Statements of Rule.

In *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75, it is held that a public nuisance must be occasioned by acts done in violation of law. A work which is authorized by law cannot be a nuisance.

In *Pittsburgh, C. & St. Louis R. W. Co. v. Brown*, 67 Ind. 45, it is held that the legislature may, when deemed necessary for the public good, permit or require that to be done which would, on common-law principles and without the statute, be deemed a nuisance.

In *Watson v. Fairmont & S. Ry. Co.*, 49 W. Va. 528, 39 S. E. 193, it is held that when a person or corporation is authorized by the legislature by an express statute to do an act or by the council of a city or town to which the power to authorize it has been delegated by a legislative act, such person or corporation cannot be regarded as committing a nuisance in the execution of such act nor proceeded against merely upon the theory that it is a nuisance, either at law or in equity.

2. Illustrations.

a. Highways and Other Things over Which Public Has Control.

In *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10, 8 N. E. 537, 27 Am. & Eng. R. Cas. 376, it is held that a legislature may authorize, and thereby remove from the status of a legal public nuisance, those things, in connection with the public highway, streams, or other matters in which the public has an interest, and over which it has control, that would otherwise constitute such nuisances.

b. Railroads in Streets.

In *Milburn v. City of Cedar Rapids*, 12 Iowa 246, it is held that where the legislature has conferred upon railroad companies the right to construct their road over and upon the streets of towns and cities, the consent of the municipality through which the road passes being first obtained, railroads constructed upon streets under such authority cannot be considered as public nuisance.

In *State v. City of Trenton*, 36 N. J. L. 79, it is said in the opinion: "The prosecutors claim that the railway, if constructed, will be a nuisance. But no structure which has the sanction of lawful authority can be a nuisance."

c. Abutment in Street—Elevated Railway.

In *Garrett v. Lake Roland Elevated Ry. Co. (Md.)*, 1 Am. & Eng. R. Cas., N. S., 385, it is held that an abutment erected in the center of a public street, as an approach to the tracks of an elevated railway company, placed there under proper authority of the city does not constitute a public nuisance.

Note

In this case it is said in the opinion: "The abutment and elevated structure, having been built under legislative authority, are not a nuisance. *O'Brien v. Railroad Co.* (74 Md. 363, 22 Atl. 141, 50 Am. & Eng. R. Cas. 194), supra. "That cannot be a nuisance, such as to give a common law right of action, which the law authorizes." *Northern Transf. Co. v. Chicago* (99 U. S. 635), supra. It may be stated as a general rule, that whatever is authorized by statute within the scope of legislative powers, is lawful, and therefore, cannot be a nuisance."

d. Authorized Obstruction of Public Road.

In *Danville, H. & W. R. Co. v. Commonwealth*, 73 Pa. St. 29, it is held that a railroad company occupying a portion of a public road not exceeding the extent allowed by law, and obstructing public travel on such portion, is not guilty of a public nuisance.

e. Business Conducted in Proper Manner—Location Designated.

In *State v. Barnes*, 20 R. I. 525, 40 Atl. 374, it is held that that which the law authorizes cannot be held to be a public nuisance; hence a business carried on at a place designated by statute cannot be declared a public nuisance so long as the licensee keeps strictly within the terms of his license, and conducts the business in a reasonably careful and proper manner.

f. Bawdy House.

A bawdy house is a public or common nuisance per se, but this is not the case when such house is authorized by law and kept in accordance with its provisions. So held in *Givens v. Van Studdiford*, 86 Mo. 149.

g. Works of Internal Improvement—Transfer to Private Corporation—Obstruction of Water—Health.

Works of internal improvement erected by the state, for the benefit of the citizens at large, do not become a public nuisance, because they may render the neighborhood unhealthy, by reason of the obstruction of running water and the consequent overflowing of the adjacent lands; nor is their character changed, by a transfer into the hands of a private corporation, with a requirement that the works shall be kept up for the purposes of their creation. So held in *Commonwealth v. Reed*, 34 Pa. St. 275.

h. Dam—Specified Location and Height—Indictment.

Where a dam has been built across a river at a certain specified place, and of a certain height, under express authority of an act of the legislature, the person building or maintaining it is not liable to an indictment for a public nuisance created by such dam. So held in *Stoughton v. State*, 5 Wis. 291.

i. Canal—Purchase from State—Seepage—Noisome Pools—Indictment.

But in *Delaware Division Canal Co. v. Commonwealth*, 60 Pa. St. 367, it appeared that the company purchased a canal from the state, part of the public works as it had been constructed by the state; that water escaped through the banks of the tow path and formed stagnant and noisome pools on adjoining land not belonging to the canal company. It was held that the company was indictable for maintaining a nuisance.

j. Railroad in Street—Improper Use.

And an improper use, damaging to the public, by a railroad company, of a grant of a right of way over the streets of a town, constitutes a public nuisance. So held in *Town of Mason v. Ohio River R. Co.* (W. Va.), 2 R. R. R. 899, 25 Am. & Eng. R. Cas., N. S., 899, 41 S. E. 418.

k. License to Manufacture Fertilizers.

And a license to manufacture "fertilizers and materials" does not authorize such manufacture in a way to create a public nuisance. So held in *Garrett v. State*, 49 N. J. L. 94, 7 Atl. 29.

3. Statute Must Be Strictly Construed.

The legislature has power to legalize, so far as the public is con-

Note

cerned, an act or business which would otherwise be a public nuisance, but such a grant, being against common right, should receive strict interpretation. So held in *Garrett v. State*, 49 N. J. L. 94, 7 Atl. 29.

4. Municipal Powers.

In *State v. Luce* (Del.), 32 Atl. 1076, it is held that a municipal corporation, in the absence of legislative authority, cannot legalize a common nuisance.

In *Lockwood v. Wabash R. Co.*, 122 Mo. 86, 1 Am. & Eng. R. Cas., N. S., 16, it is held that it is incompetent for a city to authorize such use of a street as will create a public nuisance or destroy it as a thoroughfare.

B. Private Nuisances.

According to the doctrine prevailing in the United States, statutory authorization may prevent that from being an actionable nuisance to private property which in the absence of legislative sanction would entitle the property owner to compensation or injunctive relief, where the thing or act authorized does not come within a constitutional provision prohibiting the taking or damaging of private property without just compensation.

UNITED STATES.—*Northern Transp. Co. v. Chicago*, 99 U. S. 635.

ARKANSAS.—*St. Louis I. M. & S. Ry. Co. v. Morris*, 35 Ark. 622, 5 Am. & Eng. R. Cas. 48.

COLORADO.—*Colorado Cent. R. R. Co. v. Mollandin*, 4 Colo. 154.
DISTRICT OF COLUMBIA.—*Neitzey v. Baltimore & Potomac R. Co.* (D. C.), 5 Mackey 34, 26 Am. & Eng. R. Cas. 553.

GEORGIA.—*Banking Co. v. Maddux* (Ga.), 5 R. R. R. 566, 28 Am. & Eng. R. Cas., N. S., 566, 42 S. E. 315.

INDIANA.—*Dwenger v. Chicago & G. T. Ry. Co.*, 98 Ind. 153, 20 Am. & Eng. R. Cas. 26; *Pittsburgh, C., C. & St. L. Ry. Co. v. Welch*, 12 Ind. App. 433, 40 N. E. 650; *Tate v. Ohio, etc., R. Co.*, 7 Ind. 479.

IOWA.—*Cook v. Chicago M. & St. P. Ry. Co.*, 83 Iowa 278, 49 N. W. 92; *Dunsmore v. Central Iowa R. Co.*, 72 Iowa 182, 33 N. W. 456; *Miller v. City of Webster City*, 94 Iowa 162, 62 N. W. 648.

KANSAS.—*Atchison & N. R. Co. v. Garside*, 10 Kan. 552.

KENTUCKY.—*Henderson Belt R. Co. v. Dechamp*, 95 Ky. 219, 24 S. W. 605.

LOUISIANA.—*Hill v. Chicago, St. Louis & N. O. R. Co.*, 38 La. Ann. 599; *Werges v. St. Louis, C. & N. O. R. Co.*, 35 La. Ann. 641.

MAINE.—*Gowen v. Penobscot R. Co.*, 44 Me. 140; *Whitney v. Maine C. R. Co.*, 69 Me. 208.

MASSACHUSETTS.—*Bacon v. Boston*, 154 Mass. 100, 28 N. E. 9; *Bancroft v. Cambridge*, 126 Mass. 441.

MICHIGAN.—*Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62.

MINNESOTA.—*Romer v. St. Paul City Ry. Co.*, 75 Minn. 211, 77 N. W. 825.

MISSOURI.—*Payne v. Kansas City, St. J. & C. B. Ry. Co.*, 112 Mo. 6, 20 S. W. 322; *Randle v. Pacific Railroad*, 65 Mo. 325.

NEW JERSEY.—*Beseman v. Pennsylvania R. Co.*, 52 N. J. L. 221, 20 Atl. 169; *Morris & E. R. Co. v. City of Newark*, 10 N. J. Eq. 352.

NEW YORK.—*Babbage v. Powers*, 130 N. Y. 281, 29 N. E. 132; *First Baptist Church, etc. v. Utica & Sch. R. Co.*, 6 Barb. (N. Y.), 313; *Fobes v. Rome & O. R. Co.*, 121 N. Y. 505, 24 N. E. 919; *Williams v. New York Cent. R. Co.*, 18 Barb. (N. Y.), 222.

OHIO.—*Parrot v. Cincinnati, H. & D. R. Co.*, 10 Ohio. St. 624.

PENNSYLVANIA.—*Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339; *Jones v. Erie & W. V. R. Co.*, 151 Pa. St. 30, 25 Atl. 134; *Pennsylvania R. Co. v. Lippincott*, 116 Pa. St. 472, 9 Atl. 871; *Pennsylvania R. Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. 690; *Sparhawk v. Railway Co.*, 54 Pa. St. 401; *Struthers v. Dunkirk, W. & P. Ry. Co.*, 87 Pa. St. 282.

Note

TENNESSEE.—*Railroad v. Bingham*, 87 Tenn. 522, 11 S. W. 705.
 VERMONT.—*Hatch v. Vermont Cent. R. Co.*, 28 Vt. 142.

WISCONSIN.—*Dolan v. Chicago, M. & St. P. Ry. Co.* (Wis.), 8 R. R. R. 133, 31 Am. & Eng. R. Cas., N. S., 133; *Hanlin v. Chicago & N. W. Ry. Co.*, 61 Wis. 515, 21 N. W. 263.

When the legislature has authorized an act, the necessary and natural consequence of which is injury to the property of another, and at the same time has prescribed the mode of compensation, he who does the act cannot be held liable as a wrongdoer. So held in *Alldrich v. Cheshire R. Co.*, 21 N. H. 359.

When the legislature, in the legitimate exercise of the right of eminent domain, has chartered a corporation with certain powers and privileges, the corporation in exercising such powers and privileges, is not liable for consequential damages from such exercise, without fault or negligence on its part. So held in *Summer v. Richardson Lake Dam Co.*, 71 Me. 106; *Boothby v. Androscoggin & Kennebec R. Co.*, 51 Me. 318.

1. Consequential Damages—Right Creature of Statute.

In *Transportation Company v. Chicago*, 99 U. S. 635, it is held that that which the law authorizes cannot be a nuisance such as to give a common-law right of action.

In this case it is said in the opinion: "We refer to an action at common law such as this is. A legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without authority would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. In such acts of power a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer, but then the right is a creature of the statute. It has no existence without it. If this were not so the suffering party would be entitled to repeated actions until an abatement of the erections would be enforced, or perhaps he might restrain them by injunction."

2. Compensation—Absence of Legislative Requirement.

An act done under authority of law, if done in a proper manner, will not subject the party doing it to an action for the consequences, whatever they may be, if the law does not provide for compensation for injuries of such character. So held in *Bellinger v. New York Cent. R. Co.*, 23 N. Y. 42.

3. Discomfort to Be Endured for Public Good.

In *Miller v. City of Webster City*, 94 Iowa 162, 62 N. W. 648, it is said in the opinion: "While the sovereign power cannot take away absolutely the private right of individuals, by the legislative creation of a nuisance, yet one is expected to submit to a reasonable amount of discomfort, for the general public good."

In *Transportation Co. v. Chicago*, 99 U. S. 635, it is held that acts done in the proper exercise of governmental power, and not directly encroaching on private property, though their consequences may impair its use, are universally held not to be a taking, within the meaning of the constitutional provision prohibiting the taking of private property for public use without making just compensation.

4. Enjoyment of Property Not Directly Disturbed—No Right of Action.

Acts authorized by statute, which do not directly encroach upon the property of an individual or disturb him in its possession or enjoyment, will not entitle him to compensation or give him a right of action. So held in *Payne v. Kansas City, St. J. & C. B. Ry. Co.*, 112 Mo. 6, 20 S. W. 322.

5. Injuries from Acts Done in Conformity to Law—Forfeiture of Chartered Rights or Suit Authorized by Law.

In *Gowen v. Penobscot R. Co.*, 44 Me. 140, it is held that no action can be maintained against a railroad corporation for injuries by acts

Note

done in conformity to law, unless the corporation has in some way forfeited their chartered rights or the charter remedy has been rightfully modified by some statute, so as to authorize such suit.

6. Small Nuisances May Be Authorized.

In *Bacon v. Boston*, 154 Mass. 100, 28 N. E. 9, it is said in the opinion: "The general rule is that the legislature may authorize small nuisances without compensation, but not great ones."

7. Mill—Ringling Bell—Injunction—Subsequent Legislative Authority.

In *Sawyer v. Davis*, 126 Mass. 239, after it had been decided by the supreme court of the state that the ringing of a bell on a mill was a private nuisance to the plaintiff, and after a final injunction was issued restraining such ringing, the legislature passed a statute authorizing manufacturers, for the purpose of giving notice to employees, to ring bells and use whistles and gongs of such size and weight and in such manner and at such hours, as the board of aldermen of cities and the selectmen of the town might designate. The selectmen of the town where such mill was situated granted a license to the owner to ring the bell on the mill at the hour at which he was prevented from ringing it by injunction. It was held on a bill of review, brought by the mill owner, seeking to have the injunction dissolved, that the statute was constitutional. It was said in the opinion: "And when the legislature directs or allows, that to be done which would otherwise be a nuisance, it will be valid, upon the ground that the legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law."

8. Street—Authorized Obstruction—Liability Limited by Principles Governing Actions of Negligence.

In *Babbage v. Powers*, 130 N. Y. 281, 29 N. E. 132, it is held that while the public is entitled to have a street or highway remain in the condition in which it placed it, and whoever, without special authority, materially obstructs it or renders its use hazardous by doing any thing upon, above, or below the surface, is guilty of a nuisance, when it appears that the act was done with the consent of the proper officials, the rule of liability is relaxed and rests upon and is limited by the ordinary principles governing actions of negligence.

9. Public Work for Federal Government—Absence of Negligence—Liability of Contractor.

When a contractor doing, in a proper manner, a public work required by a contract with the federal government, which it is authorized to make, and exercises due care in the prosecution thereof, injures private property, he is not liable therefor. So held in *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, 31 N. E. 328.

10. Public Improvement—Vessels Prevented from Entering Dock.

In *Transportation Co. v. Chicago*, 99 U. S. 635, it appeared that plaintiff was the owner of lands situated at the intersection of La Salle street in Chicago, with the Chicago river, upon which it had valuable dock and warehouse accommodations, with a line of steamers accustomed to land at that dock; that he was interrupted in the use thereof by the building of a tunnel under the Chicago river by authority of the state legislature, in accomplishing such work it was necessary to tear up La Salle street which cut off plaintiff's access to his property for a considerable time; and the work also made it necessary to build a coffer dam in the Chicago river, which prevented his vessels from entering his docks. It was held that such injuries were *damnum absque injuria*.

11. Dam to Improve Navigation—Destruction of Mill Site.

In *Monongahela Navigation Co. v. Coons*, 6 Watts & Seary (Pa.), 101, it appeared that plaintiff's mill site was destroyed by the backing up of water by a dam built by a canal company under authority of law for the improvement of navigation. It was held that this was a

Note

mere consequential damage resulting from the exercise of the public right to improve navigation; that it was *damnum absque injuria*; and that such flooding and injury did not amount to a taking under the constitution.

12. Consequential Damages Recovered—Work Not Subject to Abatement.

A person who has recovered against another for consequential damages to his lands, resulting from the erection of a public work, not touching such lands, which was carefully and skillfully erected in accordance with authority duly conferred by the state, cannot have such work declared a nuisance subject to abatement. So held in *New Albany & S. R. Co. v. Higman*, 18 Ind. 77.

13. Slaughter House—Bar to Injunction in Advance.

Although valid legislative authority to operate a slaughter house in a city may not exempt from compensatory liability for injuries to private property, it is a complete bar to an injunction in advance. So held in *Darcantel v. Slaughter House, etc., Co.*, 44 La. Ann. 632, 11 So. 239.

14. Steam Engines and Furnaces—Compliance with Statute—Burden of Proof.

In *Call v. Allen*, 83 Mass. 137, it is held that where the use of steam engines and furnaces has been regulated by an order of the municipal authorities, under statutory authority, the burden is on the party complaining of the works as a nuisance to prove a non-compliance with the terms of the order, or an unlawful or improper use of the works.

15. Steam Engine—Municipal License.

A steam engine erected in a building situated on State street in Boston, under a license from the board of aldermen, and lawfully operated cannot be a private nuisance. So held in *Saltonstall v. Banker*, 74 Mass. 195.

16. Injury Not Actionable at Common Law if Done by Individual—Compensation—Absence of Statutory Provision.

When the legislature authorizes something to be done in the neighborhood of a person's land which diminishes its value, but which would not be actionable at common law if done by a neighboring owner, if the statute provides no compensation, the owner of the land cannot claim any under the constitution, because what is done does not amount to a taking; and even if the thing authorized would be actionable at common law, and a nuisance, but for the statute, still it is not necessarily a taking. So held in *Lincoln v. Commonwealth*, 164 Mass. 368, 41 N. E. 489.

17. Telephone Wires—Lightning—Noise—Insurance—Public Interests—Injunction.

In *Hewett v. Western Union Tel. Co., etc.* (D. C.), 4 Mackey 424, it is said in the opinion: "It seems to this court that it would be an extraordinary stretch of power to strike down a great commercial agency, to destroy one of the chief instrumentalities of intercommunication in this country, because, peradventure, lightning might be passing along a wire and strike the house of a party who lived near the line of the telegraph, or that it increased the amount of his insurance, or that it made some noise occasionally which excited the nerves of a restless sleeper so that he was unduly wakeful during the hours of the night."

18. All Equities Considered.

In *Hewett v. Western Union Tel. Co.* (D. C.), 4 Mackey 424, it is held that on an application for injunctive relief against an alleged private nuisance growing out of the exercise of a right granted by the legislature, a court of chancery will consider all the equities of the case, and where as a consequence of its interference, the hard-

Note

ship upon one side would be immeasurably greater than the injuries sustained by the other it will not interpose the extraordinary remedy of injunction, but will leave the complainant to his action at law.

19. Statutory Sanction Must Be Clear.

In order to justify acts which by the general rules of law constitute a nuisance to private property, by legislative authority, they must be expressly authorized by the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred.

ENGLAND.—*Truman v. London & Brighton Ry. Co.* (Eng.), L. R. 25 Ch. Div. 423; *Hill v. Managers of The Metropolitan Asylum District* (Eng.), L. R. 42 B. Div. 433; *Smith v. Midland R. Co.* (Eng.), 37 L. G. 234, 25 W. R. 861.

UNITED STATES.—*Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 11 Am. & Eng. R. Cas. 15; *Chicago, etc., R. Co. v. Leavenworth City First M. E. Church* (C. C. A.), 102 Fed. 85; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Woodruff v. North Bloomfield Gravel Min. Co.* (C. C.), 18 Fed. 753.

CALIFORNIA.—*Sullman v. Rozer*, 27 Cal. 248; *Tuebner v. California St. R. Co.*, 66 Cal. 171, 4 Pac. 1162.

ILLINOIS.—*Swell v. Buresh*, 123 Ill. 151.

IOWA.—*Churchill v. Burlington Water Co.*, 94 Iowa 89, 62 N. W. 646; *Miller v. City of Webster City*, 94 Iowa 162, 62 N. W. 648.

MASSACHUSETTS.—*Commonwealth v. Kidder*, 107 Mass. 188; *Eames v. New England Worsted Co.*, 52 Mass. 570; *Quinn v. Lowell Elec. Light Corp.*, 140 Mass. 106, 3 N. E. 200.

MINNESOTA.—*Village of Pine City v. Munch*, 42 Minn. 342, 44 N. W. 197.

MISSOURI.—*Mathews v. St. Louis, etc., R. Co.*, 121 Mo. 298, 24 S. W. 591; *Missouri River Packet Co. v. Hanibal & St. Joseph R. R. Co.*, 79 Mo. 478, 20 Am. & Eng. R. Cas. 275.

NEW HAMPSHIRE.—*State v. Wilson*, 43 N. H. 415.

NEW JERSEY.—*Garrett v. State*, 49 N. J. L. 94, 7 Atl. 29; *Thompson v. Pennsylvania R. Co.*, 45 N. J. Eq. 870, 14 Atl. 897; *Tinsman v. Belvidere Delaware R. Co.*, 2 Dutch (N. J.), 148.

NEW YORK.—*Bellinger v. New York Cent. R. Co.*, 23 N. Y. 42; *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10, 8 N. E. 537; *Garvey v. Long Island R. Co.*, 159 N. Y. 323, 54 N. E. 57; *Morton v. New York*, 140 N. Y. 207, 35 N. E. 490; *Plank Road Co. v. Buffalo, etc., R. Co.* (N. Y.), 23 Barb. 644; *Spring v. Delaware, etc., R. Co.*, 88 Hun. 385.

RHODE ISLAND.—*Hughes v. Providence & W. R. Co.*, 2 R. I. 493.

TENNESSEE.—*Railroad v. Bingham*, 87 Tenn. 522, 11 S. W. 705; *Terminal Co. v. Jacobs*, 109 Tenn. 727.

(1) Express Legislative Authority Required.

Statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance to private property, unless they are expressly authorized by the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred. So held in *Hill v. Managers of the Metropolitan Asylum District*, L. R. 4 Q. B. Div. 433, on appeal, 46 App. Cas. 193; *Truman v. London & Brighton Railway Co.*, L. R. 25 Ch. Div. 423.

(2) Natural Result of Act Authorized—Result of Manner of Doing Act.

In order to justify a nuisance by legislative authority, it must be the natural and probable result of the act authorized, so that it may fairly be said to be covered by the legislation conferring the power. If the authorized act does not necessarily or naturally create a nuisance, but such result flows from a particular manner of doing the act, the legislative license is no defense. So held in *Village of Pine City v. Munch*, 42 Minn. 342, 44 N. W. 197.

Note

(3) Very Act Must Have Been Contemplated.

In *Snell v. Buresh*, 123 Ill. 151, 13 N. E. 856, it is held that the statutory sanction which will justify an injury by a corporation to private property without making compensation therefor and without the consent of the owner, must be express, or given by clear and unmistakable implication, so that it can fairly be said the legislature contemplated the very act causing the injury. When the terms of the statute are merely permissive the act will not confer a license to commit a nuisance.

(4) Permissive Authority—Acts Contemplated by Statute.

In *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10, 8 N. E. 537, it is held that where the terms of a statute, giving authority to a railroad corporation, are not imperative, but only permissive, this does not confer license to commit a nuisance, although what is contemplated by the statute cannot be done without.

(5) Municipal Acts—Express Legislative Authority Required.

In *Morton v. New York*, 140 N. Y. 207, 35 N. E. 490, it is held that while liability in damages cannot result from acts of a municipal corporation, done in the performance of a public duty by express legislative authority, which as between individuals would be regarded as a nuisance and which result in injury to another, the authority must be express, or clear and unquestionable implication from powers conferred, and must be certain and unambiguous, showing that the legislature must have intended and contemplated the very act in question.

(6) Municipal Corporations—Legislative Authority Not to Be Inferred.

In *Miller v. City of Webster City*, 94 Iowa 162, 62 N. W. 648, it is said in the opinion: "Where a municipal corporation is authorized to do a particular thing, so long as it keeps within the power granted, it is protected from proceedings on behalf of the public, subject possibly to this qualification that the nuisance, if any, arises as a natural and probable cause of the act authorized, so that it may fairly be said to be covered, in legal contemplation by the legislation conferring the power. If this nuisance is not the necessary result of the act authorized, or if it might be exercised in such a manner as to obviate the nuisance, legislative authority will not be inferred from the grant, to create the nuisance, and it will not bar proceedings to abate it."

(7) Waterworks—Injury from Soot—Site Not Approved.

In *Churchill v. Burlington Water Company*, 94 Iowa 89, 62 N. W. 647, it is held that the fact that one is authorized by ordinance having legislative sanction to erect and operate waterworks does not take away liability for the discharge of soot upon adjacent dwellings, the grant stating neither place nor character of the authorized plant, and the same not having been approved by the council.

(8) Public Work for Private Profit—Compensation—Exemption—Presumption.

In *Tinsman v. Belvidere Delaware R. Co.*, 2 Dutch. (N. J.), 148, it is held that it will not be presumed that the legislature, in conferring power upon a corporation to construct a work of public improvement for private profit, and for this purpose take private property upon making compensation, designed to exempt the corporation from liabilities for injuries resulting from their acts. The common-law liability for such injuries remains.

(9) Railroad in Highway—Authority to Construct—Injury to Private Property.

A statute merely authorizing a railroad company to construct its road along, or upon any stream, street, highway, plank road, turnpike or canal, which the route of its road shall intersect or touch, grants only the right which the public have in such highway, etc.,

Note

and does not grant any right to violate private property without the consent of the owners. So held in *Plank Road Co. v. Buffalo, etc.*, R. Co. (N. Y.), 23 Barb. 644.

(10) Authority to Bring Tracks within City—Shops and Engine Houses.

In *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, it is held that legislative authority to bring railroad tracks within municipal limits and to construct shops and engine houses there, does not confer authority to maintain a nuisance.

In this case it is said in the opinion: "It is no answer to the action of the plaintiff that the railroad company was authorized by act of congress to bring its track within the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop, in question were thus necessary and expedient; that they are skillfully constructed; that the chimneys of the engine house are higher than required by the building regulations of the city, and that as little smoke and noise are caused as the nature of the business in them will permit. "In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capital, or in the most densely populated locality. Indeed the corporation does assert a right to place its works upon property it may acquire anywhere in the city. Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred."

(11) Engine House and Coal Bins—Soot and Smoke—Statute—Location Not Designated.

In *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10, 8 N. E. 537, it is said in the opinion: "The court placed its judgment, denying relief, upon the ground that the defendant was a railroad corporation, authorized by law to acquire real estate for engine house; that an engine house at the point where this was erected was necessary for the operation of its road, and that in the construction and use of the engine house and coal bins it had exercised all practicable care. The findings of law from these premises was that whatever damages have resulted to the plaintiff, or her property by reason of the defendant's use and occupation of its engine house and coal bins is *damnum absque injuria*.

"The principle upon which the court below proceeded was that what the legislature has authorized the defendant to do can neither be a public or private nuisance: In other words the legislature has authorized the maintenance of this nuisance by the defendant, and the plaintiff must bear the consequences. The court below, in denying any relief to the plaintiff, of course assumed that the legislative authority and the act of the defendant thereunder, resulting in flooding the plaintiff's premises with soot, smoke and noxious gases, was not a taking of the plaintiff's property within the constitution. We place our judgment in the case on the ground that the legislature has not authorized the wrong of which the plaintiff complains, and

Note

it is therefore unnecessary to determine whether the legislature have authorized it consistently with the principles of the constitution for the security of private rights without providing for compensation.

"For the purpose of this case we shall assume that the general power conferred included the latter power as incident. It is no doubt a settled principle of the law that many things may be done by the owner of land, causing consequential damages to his neighbor, for which the law affords no remedy. The cases embraced within this rule are those either where what was done was in the lawful and reasonable use by owner of land of his own property, or where the damages suffered, although by possibility attributable to the wrongful act of another, were too remote therefrom to justify the court in treating the one as the sequence of the other. The case before us belongs to neither of these categories. The defendant's engine house as maintained was a palpable nuisance, causing special injury to the plaintiff, for which by the general rule of the common law she has a right of action. The defendant however does not rely for its justification upon the ordinary rule governing the rights of adjoining proprietors, but as we have said, rests upon the claim that the legislature has authorized the acts of which the plaintiff complains, and has therefore made that lawful which otherwise might be unlawful and has taken away any remedy which the plaintiff otherwise might have had, it is undoubtedly true that there are cases in which the legislature in the public interest may authorize and legalize the doing of acts resulting in consequential injury to private property, without, providing compensation, and as to which the legislative sanction may be pleaded in bar of any claim for indemnity. Indeed, such is the transcendent power of parliament that it is the settled doctrine of the English law that no court can treat that as public or private wrong which parliament has authorized, and consequently as stated by Blackburn, J., in *Hammersmith, etc., Ry. Co. v. Brand*, 4 H. L. Cas. (Eng. & I. App.), 171, the person who has sustained a loss by the doing of that act is without remedy, unless in so far as the legislature has thought proper to provide for compensation. The legislative power in this country is subject to restriction, but nevertheless private property is frequently subjected to injury from the execution of public powers conferred by statute, for which there is no redress. The case of consequential injuries resulting from street improvements authorized by the legislature is a familiar example. "What may be a sufficient statutory sanction for acts which injuriously affect general public rights are individual property is illustrated by cases which hold that an authority to construct a railroad and use locomotives thereon, takes away any remedy by indictment or private action, for such consequences as necessarily result from the use of locomotives such as noise, vibration, etc., although no compensation is provided (*Rex v. Pease*, 4 Barn. & Adol. 30; *Vaughan v. Taff Vale R. Co.*, 5 Hurl & Norm, 679; *Hammersmith Ry. Co. v. Brand*, supra).

"The authority conferred upon the defendant by the sixth section of the act of 1848, to run its trains over the Harlen railroad, was not, however broadly construed, a legislative sanction to commit a nuisance upon private property. The authority expressly given was not absolute, but conditional upon obtaining the consent of the Harlen railroad. It could not be known by the legislature that the building of an engine house would necessarily interfere with private rights. However necessary it may be for the defendant that its engine house be located where it is, this constitutes no justification for the injury suffered by the plaintiff, nor is it any answer to the action that it exercises all practicable care in its management. It may have the right, which it claims, to acquire land by purchase for its business, but it must secure such a location as will enable it to conduct its operations without violating the just rights of others. Public policy indeed requires that in adjusting the mutual relations

Note

between railroad companies and individuals, courts should not stand upon the assertion of extreme rights on either side, but in this case the facts leave no room for doubt that the plaintiff has suffered a substantial and unauthorized injury."

(12) Engine House—Compensation—General Grant of Authority—Presumption.

Even if the legislature can authorize a railroad company to maintain an engine house under circumstances which if maintained by an individual would, by the common law, constitute a nuisance to private property without providing compensation, the authority to do so must be express or given by clear and unquestionable implication from the powers expressly conferred, so it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury; as it cannot be presumed from a general grant of authority. So held in *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10, 8 N. E. 537.

(13) Location of Round House—Railroad Acts in Private Capacity.

A railroad company authorized by its charter to acquire and hold at such places as it shall find expedient, all necessary real estate on which to construct, operate and maintain terminal railroad facilities, etc., in selecting a place for its round house, acts in a private capacity, and is responsible for the injurious consequences which may result from its improper use by it, for its charter gives it no right to enjoy its property at the expense of another's property, and in this respect it stands no higher than an individual, and is entitled to no superior rights or immunities, and the charter right is no defense in an action against it for damages resulting from a nuisance created by it in the improper use of its round house and engines. So held in *Terminal Co. v. Jacobs*, 109 Tenn. 727.

(14) Switching—Dangerous Speed—Standing Trains—Cinders.

In *Railroad v. Bingham*, 87 Tenn. 522, 11 S. W. 705, it is held that under permission to operate its road upon a public street, a railroad company is not allowed to use the street for ordinary switching purposes, or to run its trains at illegal and dangerous speed, or to leave its trains standing unreasonably, or to park its cars thereon, or to suffer engines to throw cinders, etc., unnecessarily upon adjoining premises; and such acts constitute a nuisance which entitles an abutting owner, although he does not own the fee in the street in front of his premises, to recover for damages to them resulting from such improper and unlawful use of the street.

(15) Only Right of Way in Street Granted—Terminal Yard.

A railroad company using, for the purposes of a terminal yard, a portion of a street, over which it has only a right of way, is responsible for any nuisance, public or private, thereby created. So held in *Thompson v. Pennsylvania R. Co.*, 45 N. J. Ch. Eq. 870, 14 Atl. 897.

(16) Operation of Stationary Engine—Street Railways—Municipal License.

In *Tuebner v. California St. R. Co.*, 66 Cal. 171, 4 Pac. 1162, it is held that a license granted by a municipality to a railroad company to run a line of cable cars along the streets of a city does not authorize the company to construct and operate a stationary engine upon its land in such manner as to interfere with the comfortable enjoyment of his premises by an adjoining owner.

(17) License to Operate Steam Engine in City—Nuisance—Soot.

A license from the board of supervisors of the city and county of San Francisco to erect and maintain a steam engine within the city limits does not authorize the licensee to use it so as to create a nuisance by allowing the soot from the engine to become an annoyance or source of injury to the neighbors. So held in *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655.

Note

(18) Stationary Steam Engine—Noise—Vibration—License No Bar to Action.

In *Quinn v. Lowell Elec. Light Corp.*, 140 Mass. 106, 3 N. E. 200, it is held that a license "to set up and run a stationary steam engine, for the purpose of driving machinery used in generating electricity," is no bar to an action, by the owner of the dwelling house within five hundred feet of the licensee's works, for a nuisance occasioned by noise, and a vibration from the engine. In this state a statute prohibited the erection of such an engine within five hundred feet of a dwelling house or public building without a license.

(19) Pumping Station—Selection of Site Left to Municipality.

General legislative authority to build a pumping station, without designating the site, but leaving that to the selection of the municipal corporation, does not confer power, either expressly or impliedly, to construct it so near the lands of an individual as to destroy or seriously injure their rental value. So held in *Morton v. Mayor*, etc., of New York, 140 N. Y. 207, 35 N. E. 490.

(20) Waterworks—Soot—Location and Character Not Specified.

The fact that one is authorized by ordinance having legislative sanction to erect and operate waterworks does not take away liability for the discharge of soot upon adjacent dwellings, where the grant states neither the location or character of the authorized plant, and the same has not been approved by the city council. So held in *Churchill v. Burlington Water Company*, 94 Iowa 89, 62 N. W. 646.

(21) Massachusetts Mill Act—Limited Use of Land of Another.

The Mill Act, Mass. Rev. Stats., c. 116, affords to a mill owner no warrant or excuse for causing or continuing a nuisance on his own land or the land of another. So held in *Eames v. New England Worsted Co.*, 52 Mass. 570. In this case it is said in the opinion: "It (the mill act), simply authorizes a certain limited use of the land of another, for a special purpose, (paying damages therefor) as if it were his own. But if it were his own, he could not erect or continue a nuisance upon it, to the injury of the public, or of an individual."

(22) Sewers—Injuries to Lower Proprietors—Acts of Parliament—Authority Not Implied.

In *Woodruff v. North Bloomfield Gravel Min. Co.* (C. C.), 18 Fed. 753, it is said in the opinion: "Numerous cases have been cited from the English chancery reports, largely in relation to the sewage of large cities, towns, or other organizations having the matter in charge, where these bodies have been authorized by acts of parliament to construct sewers and discharge them into the streams, which when constructed created nuisances to lands below; and in all such cases it has been held that they took nothing by implication, but must be limited to the acts clearly authorized; and that if they could not accomplish the desired object by the acts expressly authorized without creating a nuisance, they would be restrained. Although parliament, being omnipotent in its legislative capacity, could authorize nuisances, or the taking or injury to private property without compensation, it was always cautious not to do so, and the courts were still more careful not to imply or infer authority to create nuisances not clearly given in terms by the act. The following are some of the cases referred to: *Atty. Gen. v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. App. Cas. 153; *Clowes v. Staffordshire Potteries Waterworks Co.*, L. R. 8 Ch. App. Cas. 125; *Atty. Gen. v. Birmingham*, 4 Kay & J. 528; *Atty. Gen. v. Leeds Corp.* L. R., 5 Ch. 583."

(23) Cleaning and Relighting Engines—Unreasonable Use—Injunction.

In *Smith v. Midland R. Co.* (Eng.), 37 L. G. 234, 25 W. R. 861, it is held that the emission of smoke and noxious vapors during the operation of cleaning the engines and relighting the engine fires, so

Note

as to annoy the owner of a dwelling house adjoining the railroad tracks, is not a necessary evil to the proper working of the line, or a reasonable user for purposes of the railroad within the meaning of Railways Clauses Act, 1845, and such a nuisance may be enjoined.

(24) Municipal Corporations—Acts Not Contemplated by Legislature.

In *Morton v. New York*, 140 N. Y. 207, 35 N. E. 490, it is held that while legal liability in damages cannot result from acts of a municipal corporation, done in the performance of a public duty by express legislative authority, which as between individuals would be regarded as a nuisance, and which result in injury to another, the authority must be express, or a clear and unquestionable implication from powers conferred, and must be certain and unambiguous, showing that the legislature must have intended and contemplated the very act in question.

Station and Railroad Hydrant in Street—Mere Authority to Operate and Maintain Railroad on Street.

The right of a railroad company to erect and maintain stations and a water tank or hydrant in a public street does not arise by implication from a mere license "to operate and maintain the railroad" on the street. So held in *Chicago, etc., Ry. Co. v. First M. E. Church of Leavenworth* (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 538.

20. Injuries to Private Property.

Although what is authorized by the legislature, within the scope of its constitutional powers, cannot be a public nuisance, it may be a private nuisance, and the legislative authorization is no protection against a private action for special damages to property resulting from the exercise of the power conferred, where the injury amounts to a taking or injuring within the meaning of constitutional provisions prohibiting the taking or damaging of private property for public use without just compensation.

ENGLAND.—*Truman v. London & Brighton Railway Co.* L. R., 25 Ch. Div. 423.

UNITED STATES.—*Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 11 Am. & Eng. R. Cas. 15.

CONNECTICUT.—*Bradley v. New York & New Haven R. Co.*, 21 Conn. 294.

DISTRICT OF COLUMBIA.—*Hewett v. Western Union Tel. Co.*, etc., 4 Mackey (D. C.), 424.

GEORGIA.—*Davis v. East Tenn. Va. & Ga. Ry. Co.*, 87 Ga. 605, 13 S. E. 567; *Phinzy v. City Council of Augusta*, 47 Ga. 260; *Savannah, F. & W. Ry. Co. v. Parish*, 117 Ga. 893, 45 S. E. 298; *South Carolina R. Co. v. Steiner*, 44 Ga. 547.

ILLINOIS.—*Alton H. R. & C. Co. v. Deitz*, 50 Ill. 210; *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 511, 14 Am. & Eng. R. Cas. 153; *City of Alton v. Hope*, 68 Ill. 167; *City of Aurora v. Reed*, 57 Ill. 29; *Pekin v. Brereton*, 67 Ill. 477; *Devins v. Peoria*, 41 Ill. 502; *Pittsburg, F. W. & C. R. Co. v. Reich*, 101 Ill. 157; *Wylie v. Elwood*, 134 Ill. 281, 25 N. E. 570.

INDIANA.—*Burkam v. Ohio & M. Ry. Co.*, 122 Ind. 344, 23 N. E. 799; *Danville & B. S. W. L. G. R. Co. v. Campbell*, 87 Ind. 57; *Chicago, St. L. & P. R. Co. v. Eisert*, 127 Ind. 156, 26 N. E. 759; *Dwenger v. Chicago & G. T. Ry. Co.*, 98 Ind. 153; *Haggart v. Stehlin*, 137 Ind. 43, 35 N. E. 997; *Weston Paper Co. v. Pope*, 155 Ind. 394, 57 N. E. 719.

IOWA.—*Bennett v. City of Marion*, 119 Iowa 437; *Churchill v. Burlington Water Company*, 94 Iowa 89; *State v. Moffett* (Iowa), 1 Greene 247.

KANSAS.—*Atchison St. Ry. Co. v. Nave* (Kan.), 17 Pac. 587.

KENTUCKY.—*Louisville v. Louisville Rolling Mill Co.* (Ky.), 3 Bush 416; *Louisville & N. R. Co. v. Orr*, 91 Ky. 109, 15 S. W. 8; *Louisville Ry. Co. v. Foster*, 108 Ky. 743; *Willis v. K. & I. Bridge Co.*, 104 Ky. 186.

Note

LOUISIANA.—Blanc *v.* Murray, 36 La. Ann. 162; Heath *v.* Texas & P. Ry. Co., 37 La. Ann. 728.

MAINE.—Cole *v.* Sproul, 35 Me. 161; Lee *v.* Pembroke Iron Co., 57 Me. 481; Norcross *v.* Thoms, 51 Me. 503.

MARYLAND.—Fertilizer Co. *v.* Spangler, 86 Md. 562, 39 Atl. 270; Susquehanna Fertz. Co. *v.* Malone, 73 Md. 268, 20 Atl. 900.

MASSACHUSETTS.—Estabrooks *v.* Peterborough & S. R. Co., 66 Mass. 224; Lincoln *v.* Commonwealth, 164 Mass. 368, 41 N. E. 489; Walker *v.* Old Colony, etc., R. Co., 103 Mass. 10.

MICHIGAN.—Robinson *v.* Baugh, 31 Mich. 209.

MINNESOTA.—Berger *v.* Minneapolis Gas Light Co., 60 Minn. 296, 62 N. W. 336; Larson *v.* Ring, 43 Minn. 88, 44 N. W. 1078.

MISSOURI.—Bielman *v.* Chicago, St. P. & K. C. Ry. Co., 50 Mo. App. 151; Culver *v.* Chicago, R. I. & P. Ry. Co., 38 Mo. App. 130; Edmondson *v.* City of Moberly, 98 Mo. 523, 11 S. W. 990.

MONTANA.—Root *v.* Butte, A. & P. Ry. Co., 20 Mont. 354, 51 Pac. 155.

NEBRASKA.—Fremont, E. & M. V. R. Co. *v.* Harlin, 50 Neb. 698, 70 N. W. 263; Omaha & N. P. R. Co. *v.* Janeczek, 30 Neb. 276, 46 N. W. 478.

NEW HAMPSHIRE.—Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143; Thompson *v.* Androscoggin River Improvement Co., 54 N. H. 545.

NEW JERSEY.—Costigan *v.* Pennsylvania R. Co., 54 N. J. L. 234, 23 Atl. 810; Hinchman *v.* Paterson Horse Railroad Co., 17 N. J. Eq. 75; McAndrews *v.* Collierd, 42 N. J. L. 189; Pennsylvania R. Co. *v.* Angel, 41 N. J. E. 316, 7 Atl. 432; Ridge *v.* Pennsylvania R. Co., 58 N. J. Eq. 172, 43 Atl. 275.

NEW YORK.—American Bank Note Company *v.* New York Elec. R. Co., 129 N. Y. 252, 29 N. E. 302; Bohan *v.* Port Jervis Gas Light Co., 122 N. Y. 18, 25 N. E. 246; Brown *v.* Cayuga & S. R. Co., 12 N. Y. 486; Cogswell *v.* New York, N. H. & H. R. Co., 103 N. Y. 10, 8 N. E. 537; First Baptist Church *v.* Schenectady & Troy R. Co. (N. Y.), 5 Barb. 79; Garvey *v.* Long Island R. Co., 159 N. Y. 323, 54 N. E. 57; Lahr *v.* Metropolitan Elec. R. Co., 104 N. Y. 268, 10 N. E. 528; McKeon *v.* See, 51 N. Y. 300; Morgan *v.* King, 35 N. Y. 454; Morton *v.* Mayor, etc., of New York, 140 N. Y. 207, 35 N. E. 490; Robinson *v.* New York & E. R. Co., 27 Barb. (N. Y.), 512; Tremain *v.* Cohoes Co., 2 N. Y. 163.

OHIO.—Ohio & W. Va. Ry. Co. *v.* Gardner, 45 Ohio St. 309.

TENNESSEE.—Terminal Co. *v.* Jacobs, 109 Tenn. 729.

TEXAS.—Daniel *v.* Fort Worth & Rio Grande Ry. Co., 96 Tex. 327; G. C. & S. F. R. Co. *v.* Eddins, 60 Tex. 656.

WEST VIRGINIA.—Henry *v.* Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863.

WISCONSIN.—Newell *v.* Smith, 15 Wis. 101.

(1) Other Statements of Rule.

In Baltimore & P. R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 11 Am. & Eng. R. Cas. 15, it is held that legislative authorization, though it exempts from liability to suits civil or criminal, at the instance of the state, does not affect claims of private citizens for damages for special inconvenience and discomfort, not experienced by the public at large.

In this case it is said in the opinion: "It admits indeed of grave doubt whether Congress could authorize the company to occupy and use any premises within the city limits, in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from the liability to suit for damages or compensation, to which individuals acting without such authority would be subject under like circumstances."

In Hewett *v.* Western Union Tel. Co., etc., 4 Mackey (D. C.), 424, it is held that a public nuisance cannot arise from the exercise of a

Note

right granted by authority of law; but if the grant be not exercised with a due regard to the rights of the citizen, a private nuisance may be created.

In *Blanc v. Murray*, 36 La. Ann. 162, it is held that although what is authorized by the legislature within the scope of its constitutional power cannot be a public nuisance, it may be a private nuisance, and the legislative grant is no protection against a private action for damages resulting therefrom. And where the right to the private action exists injunction will lie to restrain its continuance and suppress it.

In this case it is said in the opinion: "The doctrine sometimes stated in elementary works, and which has been held by some courts, that whatever it authorized by a legislature cannot be a nuisance of any kind is exploded."

(2) Special Damage from Public Nuisance.

In *Wylie v. Elwood*, 134 Ill. 381, 25 N. E. 570, it is held when a person sustains from a public nuisance a special damage different from that common to all, he may maintain an action therefor.

(3) Sewers—Discomfort—Special Injury.

In *Edmondson v. City of Moberly*, 98 Mo. 523, 11 S. W. 990, it is held that an action will lie against a city for a nuisance, injurious to plaintiff's property, created by it by the building of sewers under a general power conferred by its charter, where the injury complained of is peculiar to plaintiff by reason of the proximity of the nuisance to his property, in consequence of which he sustains discomfort and annoyance in its possession and diminution in its value, not shared in by community in general.

(4) Public Work for Private Profit—Corporation—Sovereign's Immunity.

In *Tinsman v. Belvidere Delaware R. Co.*, 2 Dutch (N. J.), 148, it is held that a corporation authorized to construct a work of public improvement for private profit are vested with the sovereign power to take private property for public use, but are not vested with the sovereign's immunity against liability for damages resulting from their acts.

(5) Private Wrongs.

For acts done under legislative sanction, which are essentially private wrongs, a railroad's company's charter is no justification. So held in *Costigan v. Pennsylvania R. Co.*, 54 N. J. L. 234, 23 Atl. 810.

An act of the legislature, authorizing a company to construct a railroad, does not give to the corporation any authority to invade private rights, without making compensation. It merely gives a franchise. It cannot confer upon the corporation any exemption for wrongs done to the rights of private property. So held in *Robinson v. New York & E. R. Co.*, 27 Barb. (N. Y.), 512.

(6) Corporations Acting for Private Profit—Compensation.

In *Pennsylvania R. R. Co. v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432, it is held that a statute cannot confer upon individuals or private corporations, acting primarily for their own profits, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made.

In this case it is said in the opinion: "An act of the legislature cannot confer upon individuals, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners. This principle rests upon the express terms of the constitution. In declaring that private property shall not be taken without recompense, that instrument secures to owners, not only the possession of property, but also those rights which render property valuable. Whether you flood the farmers' fields so that they cannot be cultivated, or pollute the

Note

bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is a taking of his property in a constitutional sense; of course mere statutory authority will not avail for such an interference with private property."

In *Pennsylvania R. R. Co. v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432, it is said in the opinion: "The proposition that the legislative authority to a private corporation or an individual to do a work for its or his own profits, includes authority to use, at whatever hazard to the persons or property of others, dangerous materials, provided they be necessary to the convenient prosecution of the work, cannot be sustained; that there is an obvious distinction between the liability of a private corporation to public prosecution for a legalized nuisance, and its liability to a private action for damages arising from such nuisance; that in the one case the legislative authority is a protection, and in the other it is not."

(7) Act Naturally Resulting in Injury to Private Property—Compensation—Legislative Intention—Presumption.

In *Lee v. Pembroke Iron Co.*, 57 Me. 481, it is said in the opinion: "The legislative authority to do the act which, however carefully done, will naturally result in damage to private property, must be coupled with provisions for ascertaining such damage and securing an indemnity to the injured party, in order to prevent those who act under it from being dealt with at common law as wrongdoers. The legislature has no power under the constitution to make over to any individual or corporation any rights save those of the public, without securing a just compensation. It is but just to presume that they have no intention to exceed their powers, and that where no specific mode of ascertaining damages is provided, they design to leave the parties to the common-law method of ascertaining them."

(8) Dam across Navigable Water—Overflowing Land—Damages.

A statute authorizing the erection of a dam across navigable water, and providing no remedy for damages to the owners of a meadow, overflowed by reason of the erection of the dam, is no defense against an action for such damages. So held in *Sinnickson v. Johnson*, 17 N. J. L. 129.

(9) Injury Necessarily Resulting from Proper Construction—Absence of Charter Remedy.

In *Evansville & C. R. Co. v. Dick*, 9 Ind. 433, it is held that if a railroad company, voluntarily, for its own profit, so constructs a work as necessarily to injure the property of an individual, and their charter gives no remedy for such injury, they are liable in an action for damages for the injury, though the work be constructed in a proper manner and place.

(10) Noise and Confusion—Trains and Cars—Damages—Legislative Authority No Defense.

In *Chicago, M. & St. P. Ry. Co. v. Darke*, 148 Ill. 226, 35 N. E. 750, it is held that if the noise, confusion and disturbance caused by the engines and cars of a railroad company to private property in the vicinity are such as would, in the absence of legislative authority, have constituted an actionable nuisance, the existence of such authority in no way relieves them of their damaging effect, so as to take away from the property owners their right to redress, or so as to convert what was before actionable into a case of *damnum absque injuria*.

(11) Dam—Flowing Back upon Land—Injunction.

In *State v. Moffett* (Iowa), 1 G. Greene 247, it is held that a statute authorizing a person to build a dam does not prevent another

Note

person from abating it as a nuisance if it caused the water to flow back upon his land, to his serious injury.

(12) Railroad Engine House and Repair Shops Located Near Church.

In *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 11 Am. & Eng. R. Cas. 15, it is said in the opinion: "Plainly the engine house and repair shop, as they were used by the railroad company, were a nuisance in every sense of the term. They interfered with the enjoyment of property which was acquired by the plaintiff long before they were built, and was held for a place for religious exercises, for prayer and worship; and they disturbed and annoyed the congregation and Sunday school which assembled there on the Sabbath and on different evenings of the week. That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrongdoer, and when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance. *Crump v. Lambert*, L. R. 3 Eq. 409."

(13) Dam—Overflowing Land—Liability.

A statute authorizing a corporation to build a dam on its own land, upon or across a river which is a highway, merely protects the corporation from an indictment for a nuisance in obstructing the river; but if, in building their dam, they overflow the land of others, such act of the legislature does not protect them against liability for such flowage. So held in *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143.

(14) Operation of Railroad—Noise—Nuisance—Legislative Authority No Defense.

In *Chicago, M. & St. Paul Ry. Co. v. Darke*, 148 Ill. 226, 35 N. E. 750, it is held that if noise and disturbance caused by the operation of a railroad to private property in the vicinity are such as would, in the absence of legislative authority, have constituted an actionable nuisance, the existence of such authority in no way relieves them of their damaging effect, so as to take away from the property owners their right to redress, or so as to convert what was actionable, into a case of *damnum abseque injuria*.

(15) Noxious Vapors—Private as Well as Public Nuisance.

In *Blanc v. Murray*, 36 La. Ann. 162, it is held that if a nuisance is susceptible of being both public and private, and is so to such an extent that an individual right is violated, then the private remedy is permissible, even though the result may open the door to a multiplicity of suits. Thus smoke, noise, noxious vapors, noisome smells, or other cause which creates a public nuisance, may, by interfering with comfortable enjoyment of property, create a private nuisance as well, and cause a special and particular damage which will justify an individual action for damages.

(16) Navigable Stream—Mining Debris—Lower Proprietors—Compensation—Constitutional Law.

In *Woodruff v. North Bloomfield Gravel Min. Co.* (C. C.), 18 Fed. 753, it is held that a statute of the state of California, expressly authorizing a mining company to discharge mining debris into a navigable stream, and thereby create a public nuisance and injury to the land of lower proprietors, would be in conflict with the fourteenth amendment of the federal constitution, and with similar provisions of the state constitution; that such legislation would either deprive the lower proprietors sustaining such injury of their property without due process of law, or would take or damage their property for alleged public use without compensation.

(17) Canal—Flooding Land—Consequence of Lawful Act.

An actionable nuisance may be caused by an act perfectly lawful in itself when the nuisance complained of is only a consequence of

Note

that act, as if a canal constructed by authority of law across land of another, by his consent, throw back water on land of another, it is an actionable nuisance. So held in *Delaware & R. Canal Co. v. Lee*, 22 N. J. L. 243.

(18) Smoke, Noise and Vibration—Necessary Concomitants of Use of Franchise Distinguished from Private Wrongs.

In *Costigan v. Pennsylvania R. Co.*, 54 N. J. L. 233, 23 Atl. 810, it is held that there is a distinction between those incidental injuries which are unavoidable in the operation of a railroad in the transaction of its business, such as the sounding of whistles, the emission of smoke and sparks from locomotives, the noise and vibrations incident to the moving of trains, annoyances from the character or condition of freight transported, and the like, which are injuries partaking of the nature of public injuries, and acts which are a direct invasion of private property; that injuries of the class first mentioned are the necessary concomitants of the use of the franchises granted; that the acts from which such injuries arise, being legalized by the company's charter, are not public nuisances and there is no foundation on which to apply the principle that a private individual may maintain an action for an injury arising from a public nuisance which is special and peculiar to him beyond that suffered by the public. But for acts done under legislative sanction, which are essentially private wrongs and a direct invasion of private property, the company's charter is no justification.

(19) Consequential Damages—Not a Taking.

But in *Transportation Company v. Chicago*, 99 U. S. 635, it is held that acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, although their consequences may impair its use, are not a taking within the meaning of the constitutional provision which forbids the taking of such property for public use without just compensation therefor.

(20) Levees—Overflows—Not a Taking.

A reclamation district, acting under the authority of the state, is not liable for the indirect and consequential damages to private lands on the river from overflows, caused by its levees, as this does not constitute a taking, within the meaning of a constitutional provision prohibiting the taking of private property for public use without compensation. So held in *Lamb v. Reclamation Dist.*, 73 Cal. 125, 14 Pac. 625.

(21) Property "Injured"—Construction of Constitutional Provision.

In *Pennsylvania R. Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. 690, it is held that the evil which the constitutional convention had before it in the adoption of § 8, art. XVI., of the constitution of 1874 of Pennsylvania, was the want of a remedy under previous constitutions to obtain compensation when property was injured or destroyed in the construction or enlargement of corporate works, though no part of the property was actually taken; that the remedy provided by the constitutional provision, to secure just compensation for property "injured or destroyed," has relation to injuries which, though popularly termed consequential, are yet to be understood as confined to such injuries to one's property as are actual, positive and visible, the natural and necessary results of the original construction or enlargement of its works by a corporation, and of such certain character that compensation therefore may be ascertained at the time the works are being constructed or enlarged, and paid or secured, as provided in the constitution, in advance; and that the word "injured" as used in such constitutional provision, means such legal wrong as would be the subject of an action for damages at common law.

21. Damages Must Be Special.

a. General Rule.

Although an act or thing authorized by law may be, or result in causing, a private nuisance, damage to private property must be

Note

special to plaintiff's person or property, in order to enable him to maintain an action on account of it. If the right invaded or impaired is a common and public one such as every citizen may exercise or enjoy a deprivation of the right which affects all citizens alike, and does not cause any special or peculiar damage to anyone, furnishes no valid cause of action in favor of an individual.

UNITED STATES.—*Miller v. Long Island R. Co.* (C. C.), Fed. Cas. No. 9580a.

ALABAMA.—*Baker v. Selma St. & S. Ry. Co.* (Ala.), 7 R. R. R. 506, 30 Am. & Eng. R. Cas., N. S., 506, 33 So. 685.

DISTRICT OF COLUMBIA.—*Neitzey v. Baltimore & Potomac R. Co.* (D. C.), 26 Am. & Eng. R. Cas. 553.

ILLINOIS.—*Wylie v. Elwood*, 134 Ill. 281, 25 N. E. 570; *City of Chicago v. Union Bldg. Ass'n*, 102 Ill. 379.

INDIANA.—*Dwenger v. Chicago & G. T. Ry. Co.*, 98 Ind. 153, 20 Am. & Eng. R. Cas. 26; *Sunderland v. Martin*, 113 Ind. 411, 15 N. E. 689.

LOUISIANA.—*Irwin v. Great So. Tel. Co.*, 37 La. Ann. 63.

MASSACHUSETTS.—*Wesson v. Washburn Iron Co.*, 95 Mass. 95.

MISSOURI.—*Gates v. Kansas City Bridge & Term. Ry. Co.*, 111 Mo. 28, 19 S. W. 957.

NEW YORK.—*First Baptist Church v. Schenectady & Troy R. Co.*, 5 Barb. (N. Y.), 79; *First Baptist Church, etc., v. Utica & Sch. R. Co.*, 6 Barb. (N. Y.), 313; *Williams v. New York Cent. R. Co.*, 18 Barb. (N. Y.), 222.

OHIO.—*Parrott v. Cincinnati, H. & D. R. Co.*, 10 Ohio St. 624.

(1) **Absence of Special Injury.**

In *Miller v. Long Island R. Co.* (C. C.), Fed. Cas. No. 9580a, it is held that where a railroad is a lawful structure, and the use of steam is permitted by law, the proper use of the road and the steam on it is not a public nuisance to be enjoined. And, where the abuse, if any, is general and common to all owners of adjacent property, the railroad can be called to account only by the sovereign authority.

(2) **Unauthorized Occupation—Right of Citizen to Enjoin.**

Although the unauthorized occupation of a public street by a railway track may be regarded as a nuisance per se, which will be enjoined, an injunction against it will not be granted at the suit of a private citizen, or a private corporation, unless the plaintiff can make out a case of special damage. So held in *Larimer & L. St. R. Co. v. Larimer St. R. Co.*, 137 Pa. St. 533, 20 Atl. 570.

(3) **Street Railway—Location on Portion of Street Not Designated.**

In *Baker v. Selma Street & Suburban Ry. Co.* (Ala.), 7 R. R. R. 506, 30 Am. & Eng. R. Cas., N. S., 506, 33 So. 685, it is held that where a street railway, having a right, by consent of the city, to construct its lines in a certain street, undertakes to lay its tracks in a portion of the street not designated in its charter, an abutting property owner, not suffering any special injury, cannot complain.

Private persons seeking relief against a public nuisance must show that they suffer an injury distinct from that suffered by the general public, and that the injury is one that the public, in the promotion of the general interest, has not the right to inflict upon them without compensation. So held in *Cosby v. Owensboro & R. R. Co.*, 73 Ky. 289.

b. **Limitations of Rule.**

For any act obstructing a public and common right, no private action will lie for damages of the same kind as those sustained by the general public, although in a much greater degree than any other person, but an action will lie for peculiar damages of a different kind, though even in the smallest degree. So held in *City of Chicago v. Union Bldg. Ass'n*, 102 Ill. 379.

In *Wesson v. Washburn Iron Co.*, 95 Mass. 95, it is said in the

Note

opinion: "There can be no doubt of the truth of the general principle stated by the court, that a nuisance may exist which occasions an injury to an individual, for which an action cannot be maintained in his favor, unless he can show some special damage to his person or property, differing in kind and degree from that which is sustained by other persons who are subjected to inconvenience and injury from the same cause. The difficulty lies in the application of this principle. The true limit, as we understand it, within which its operation is allowed, is to be found in the nature of the nuisance which is the subject of complaint. If the right invaded or impaired is a common and public one, which every subject of the state may exercise and enjoy, such as the use of a canal, or public landing place, or a common watering place on a stream or pond of water, in all such cases a mere deprivation of the use which excludes or hinders all persons alike from the enjoyment of the common right, and which does not cause any special or peculiar damage to any one, furnishes no valid cause of action in favor of an individual although he may suffer inconvenience or delay greater in degree than others from the alleged obstruction or hindrance. The private injury, in this class of cases, is said to be merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private individuals."

(1) Coal Shed—Noise—Same Injury Sustained by Others.

In *Wylie v. Elwood*, 134 Ill. 281, 25 N. E. 570, it is held that if one is injured in the enjoyment of his residence in a populous part of a city, from the erection and operation of a large coal shed, by noises from the use of machinery, and the grinding of coal in being moved, loaded or unloaded, and from deposit of dust, etc., he may have his action against the author of the nuisance; and it is no defense to show that the same act inflicted a like injury upon many others.

(2) Smoke and Cinders—All Property in Vicinity Injured.

In *Wesson v. Washburn Iron Co.*, 95 Mass. 95, it is held that an action may be maintained to recover damages for a nuisance to a dwelling house, caused by carrying on works and operating machinery in the vicinity, which fill the air with smoke and cinders, and render it offensive or injurious to health, and shake the building so as to injure it and render its occupation uncomfortable, although all persons owning estates in the vicinity has sustained similar injuries from the same cause. It is only when the nuisance complained of is an invasion of some common or public right that the remedy is confined to a public prosecution.

(3) Access to Cemetery—Injunction.

The fact that a public highway, as it was originally maintained, afforded plaintiffs' access to a cemetery in which some of their relatives were interred, does not authorize them to maintain a suit to enjoin the obstruction of such road or the improvement of a new road, on the ground, that such access will thereby be destroyed. So held in *Sunderland v. Martin*, 113 Ind. 411, 15 N. E. 689.

(4) Incidental Injuries—Frightening Horses.

In *Presbrey v. Old Colony & N. Ry. Co.*, 103 Mass. 1, it is held that in assessing, under Mass. Gen. Stats., c. 63, § 21 the damages occasioned to a vacant track of land by the location of a railroad which cuts off a corner of it, the depreciation of the land in value by reason of the proximity of the railroad, such as by frightening horses and the like causes "does not constitute, of itself, a ground for recovery."

In this case it is said in the opinion: "Such depreciation is not occasioned directly by any effect upon the land, of which the construction or the maintenance of the railroad is the cause. It belongs to that class of results which necessarily arise from the exercise of the franchise granted to such corporations in consideration of the general advantage which the whole community are expected to

Note

derive from it. The annoyances to the land owner are the same in kind with those which are suffered by the whole community."

(5) Smoke—Injuries to Many Others.

In *Wylie v. Elwood*, 134 Ill. 281, 25 N. E. 570, it is held that an individual who receives actual damages from a nuisance may maintain a private suit for his own injury, although there may be many others in the same situation. So the use of a steam engine in a crowded street may be a public nuisance, but if the smoke from it injures a man's goods in his shop or house, and makes his dwelling uncomfortable, he will have a right of action.

(6) Telephone Poles—Absence of Special Injury.

In *Irwin v. Great So. Tel. Co.*, 37 La. Ann. 63, it is held that abutting owners in front of whose premises telephone poles have been lawfully erected, and after compliance with all conditions imposed for the benefit of the public, have no occasion to ask the removal of the same, when the poles do not specially and materially obstruct them in the free use of their property, or invade some vested right, and do not inflict on them some injury which is not common to all other persons. Nor are poles erected under such circumstances such nuisances as such owners can have abated.

c. Noise—Case Must Be Very Special.

Although noise may amount to a nuisance, and is also actionable, yet it must be a very special case in which real estate can be injured by a mere noise, so as to give a right of action for the injury. So held in *First Baptist Church, etc., v. Utica & Sch. R. Co.* (N. Y.), 6 Barb. 313; *First Baptist Church v. Schenectady & Troy R. Co.* (N. Y.), 5 Barb. 79.

22. Railroads in Streets.**a. Consequential Injuries from Operation.****(1) General Rule.**

According to the weight authority, smoke, cinders, dust, vibration, temporary obstructions of access by passing or standing trains, and other annoyances which necessarily result from the lawful, skillful, and careful operation of a railroad in public streets, do not constitute a private nuisance, entitling an owner of property abutting on the street to maintain an action for equitable relief or for damages, unless those occupying such property are subjected to special annoyances other and greater than those sustained by persons passing along the street, which virtually amounts to a taking or injuring of the abutting property, within the meaning of constitutional provisions prohibiting the taking or damaging of private property for public use without just compensation.

UNITED STATES.—*Barney v. Keokuk*, 94 U. S. 324; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 11 Am. & Eng. R. Cas. 15.

COLORADO.—*Colorado Cent. R. R. Co. v. Mollandin*, 4 Colo. 154.

DISTRICT OF COLUMBIA.—*Neitzey v. Baltimore & Potomac R. Co.*, 5 Mackey (D. C.), 34, 26 Am. & Eng. R. Cas. 553.

GEORGIA.—*Georgia R. & Banking Co. v. Maddox* (Ga.), 5 R. R. 566, 28 Am. & Eng. R. Cas., N. S., 566, 42 S. E. 314.

ILLINOIS.—*Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460.

INDIANA.—*Dwenger v. Chicago & G. T. Ry. Co.*, 98 Ind. 153, 20 Am. & Eng. R. Cas. 26; *Pittsburg, C., C. & St. L. Ry. Co. v. Welch*, 12 Ind. App. 433, 40 N. E. 650; *Tate v. Ohio, etc., R. Co.*, 7 Ind. 479.

IOWA.—*Dunsmore v. Central Iowa R. Co.*, 72 Iowa 182, 33 N. W. 456; *Davenport v. Stevenson*, 34 Iowa 225; *Cook v. Chicago M. & St. P. Ry. Co.*, 83 Iowa 278, 49 N. W. 92; *Statten v. Des Moines Valley R. Co.*, 29 Iowa 148.

Note

KANSAS.—Ottawa, O. C. & C. G. R. Co. *v.* Larson, 40 Kan. 301, 19 Pac. 661, 36 Am. & Eng. R. Cas. 163; Atchison & N. R. Co. *v.* Gar-side, 10 Kan. 552; Wichita & Colorado Ry. Co. *v.* Smith, 45 Kan. 264, 25 Pac. 623.

LOUISIANA.—Hill *v.* Chicago, St. Louis & N. O. R. Co., 38 La. Ann. 599; Werges *v.* St. Louis, C. & N. O. R. Co., 35 La. Ann. 641.

MAINE.—Whittier *v.* Portland & K. R. Co., 38 Me. 28; Whitney *v.* Maine C. R. Co., 69 Me. 208.

MASSACHUSETTS.—Bancroft *v.* Cambridge, 126 Mass. 441; Sawyer *v.* Davis, 136 Mass. 239; Walker *v.* Old Colony, etc., R. Co., 103 Mass. 10.

MICHIGAN.—Grand Rapids & I. R. Co. *v.* Heisel, 38 Mich. 62.

MINNESOTA.—Carroll *v.* Wisconsin Cent. R. Co., 40 Minn. 168, 41 N. W. 661.

MISSOURI.—Randle *v.* Pacific R. Co., 65 Mo. 325.

NEW JERSEY.—Hayes *v.* Waverly, etc., R. Co., 51 N. J. Eq. 345, 27 Atl. 648; Beseman *v.* Pennsylvania R. Co., 52 N. J. L. 221, 20 Atl. 169; Morris & E. R. Co. *v.* City of Newark, 10 N. J. Eq. 352.

NEW YORK.—First Baptist Church, etc., *v.* Utica & Sch. R. Co., 6 Barb. (N. Y.), 313; Fobes *v.* Rome, W. & O. R. Co., 121 N. Y. 505, 24 N. E. 919; Williams *v.* New York Cent. R. Co., 18 Barb. (N. Y.), 222.

OHIO.—Parrot *v.* Cincinnati, H. & D. R. Co., 10 Ohio St. 624.

PENNSYLVANIA.—Commonwealth *v.* Erie & N. E. R. Co., 27 Pa. St. 339; Jones *v.* Erie & W. V. R. Co., 151 Pa. St. 30, 25 Atl. 134; Sparhawk *v.* Railway Co., 54 Pa. St. 401; Pennsylvania R. Co. *v.* Lippincott, 116 Pa. St. 472, 9 Atl. 871; Struthers *v.* Dunkirk, W. & P. Ry. Co., 87 Pa. St. 282; Pennsylvania R. Co. *v.* Marchant, 119 Pa. St. 641, 13 Atl. 690.

TENNESSEE.—Railroad *v.* Bingham, 87 Tenn. 522, 11 S. W. 705.

VERMONT.—Hatch *v.* Vermont Cent. R. Co., 28 Vt. 142.

WISCONSIN.—Hanlin *v.* Chicago & N. W. Ry. Co., 61 Wis. 515, 21 N. W. 623.

(3) Other Statements and Illustrations of General Rule.

"The incidental injury which results to the owner of property from the necessary smoke, dust and vibration caused by passing trains would be an actionable nuisance, if not authorized by the legislature; but being so authorized, are *damnum absque injuria*." Beach on Injunctions Swc. 1049.

"The legislative authority to occupy the street when exercised properly and with due care affords to the company a complete exemption from liability for acts and consequences which would otherwise be a nuisance, e. g. the noise and vibration of trains, the smoke, dust, etc., necessarily attending the operation of a railroad, but such authority cannot exempt the company from its obligations to pay to abutting owners compensation for the taking of their property in the street; it is beyond the power of the legislature to grant such an exemption." Wood on Railroads (Minor's Ed.), vol. 1, p. 719.

UNITED STATES.

(a) Mere Consequential Annoyance.

In Baltimore & P. R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 11 Am. & Eng. R. Cas. 15, it is said in the opinion: "Undoubtedly a railway over the public highways of the district, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation."

Note

COLORADO.

Absence of Negligence.

In *Colorado Cent. R. R. Co. v. Mollandin*, 4 Colo. 154, it is held that where a railroad company is authorized by municipal law to construct and operate its road through and across a street under such municipal control, it is the exercise of a lawful right, and is not liable in a common-law action, except for injuries done wantonly or without reasonable care.

Fee in Public—Compensation—Absence of Charter or Statutory Requirement—Damages to Premises Not Actually Taken.

In *Colorado Cent. R. R. Co. v. Mollandin*, 4 Colo. 154, it is said in the opinion: "Where there is nothing in the charter of the railroad company or statute requiring compensation for such damages, and where the fee of the street is in the town or city authorizing the construction and operation of such railroad, the latter is not liable for damages resulting to the premises of abutting lot owners not actually taken by the railroad company in the construction and lawful operation of the road.

"It may be said, however, that the fee of the streets and other public grounds of incorporated towns and cities under the laws of Colorado is in such towns and cities in trust for the public. This is doubtless true, yet for that trust the municipal authorities are alone responsible. They are impowered in their discretion to alter, vacate and abolish any street altogether, and if in the exercise of that discretion they abuse their trust, whatever liability arises thereby, attaches to them as such trustees and agents of the public. But the authority given the railroad company in a case such as the one a bar, is a license to such company under which the latter may justify for all damages resulting from a lawful exercise of the acts authorized by such license."

GEORGIA.

Terminal Yard—Noise, Smoke and Vibration—Necessary Concomitants of Franchise.

Where a railroad terminal yard is located and its operation authorized, under statutory power, if it be constructed and operated in a proper manner, it cannot be adjudged a nuisance. Accordingly, injuries and inconveniences to persons residing near such a yard, from noises of locomotives, rumbling of cars, vibrations produced thereby, and smoke, cinders, soot, and the like, which result from the ordinary and necessary, and therefore proper, use and operation of such a yard, are not nuisances, but are the necessary concomitants of the franchise granted. So held in *Georgia R. & Banking Co. v. Maddox* (Ga.), 5 R. R. R. 566, 28 Am. & Eng. R. Cas., N. S., 566, 42 S. E. 315.

INDIANA.

No right of action accrues to an abutting lot owner against a railroad company for operating its railroad in the street in the usual way, by leave of the city, when the injury is only such as the general public sustains. So held in *Dwenger v. Chicago & G. T. Ry. Co.*, 98 Ind. 153, 20 Am. & Eng. R. Cas. 26.

Divine Worship Interrupted—Answer Held Sufficient.

In *Dwenger v. Chicago & G. T. Ry. Co.*, 98 Ind. 153, 20 Am. & Eng. R. Cas. 26, an action by the owner of a lot having buildings thereon, used for worship and a school, the complaint alleged the use of the street adjoining by a railroad company for its track and for running cars thereon, whereby worship was interrupted and children attending the school imperiled, and the street obstructed, etc. The answer stated that the railroad was operated in the usual way necessary for such business; that the railroad was nine feet wide, and none of it upon plaintiff's premises, being beyond the center of the street, and was constructed by leave of the city and in manner as required by an

Note

ordinance; that the street was sixty-six feet wide and was not obstructed save as to the running of cars carefully and as is usual may temporarily have that effect as to its general use. It was held that the answer was good.

Standing Cars—Malodorous Freight—Abuse of Right Not Shown.

In *Pittsburgh, C., C. & St. L. Ry. Co. v. Welch*, 12 Ind. App. 433, 40 N. E. 650, it is held that more must be shown than annoyance and injury by offensive odors from either standing or moving cars close to plaintiff's premises to entitle him to damages. Abuse of some right must be made to appear, that is, that the cars loaded with malodorous freight were unlawfully or wrongfully suffered to remain near plaintiff's premises an unreasonable length of time.

Temporary Obstruction by Trains.

In *Gate v. Ohio, etc., R. Co.*, 7 Ind. 479, it is said in the opinion: "Nor is it intended to intimate that it is not in the power of a city to authorize the railroad company to lay a track at the grade of William street, and thus use it for the passage of the cars, in common with public and private conveyances. To that extent the municipal authority may be conceded. And though the contiguous property might be depreciated, and ingress and egress at times difficult, yet the owners would not, as in the case at bar be excluded entirely. For a great part of the time the use of the street would be as free, and the adjoining lots as accessible, as though the railroad were not there. In that case a train of cars would not differ materially in principle from a train of moving wagons. For such incidental injury there could be no redress, either public or private, unless, indeed, the cars in the one case or the wagons in the other, delayed unreasonably in passing, to the incumbrance of the street."

Nominal Damages.

Where a city grants a right to a railroad company to use a street, an abutter cannot recover of the railroad company nominal damages, but only for damages actually sustained. So held in *Burkam v. Ohio & M. Ry. Co.*, 122 Ind. 344, 23 N. E. 799.

IOWA.

Where a railroad company, properly authorized, lays its track in one of the streets of a city, the fee-simple title to which is in the public, no cause of action for damages accrues to the owner of abutting property under a statute requiring compensation to be made where private property is taken for public use, unless his property has been actually damaged thereby, and damages sustained by reason of any annoyance, inconvenience or loss suffered by him in common with the rest of the construction and operation of the railroad track cannot be recovered. So held in *Cook v. Chicago M. & St. P. Ry. Co.*, 83 Iowa 278, 49 N. W. 92.

The owner of a lot in a city has no such interest in the adjacent street as will entitle him to recover damages to his lot consequent upon the use of a right of way over such street, granted by the city authorities to a railroad company. So held in *city of Davenport v. Stevenson*, 34 Iowa 225.

KANSAS.

Noise, Smoke and Vibration—Unnecessarily Obstructing.

A railroad company having authority from the city may construct and operate its road over streets and public grounds without compensation to the abutting lot owners for the use of the same, and without being liable to such lot owners for the use of the same, and without being liable to such lot owners for consequential damages arising from noise, smoke, offensive vapors, sparks, fires, shaking of the ground and other inconveniences and annoyances, where the railroad is operated in a legal and proper manner; and it may so construct and operate his road without being liable to such lot owners for any

Note

damages where the road is constructed in a legal and proper manner, but where the property is a street or highway, the railroad will be liable to any person who may receive actual injury from the illegal or unnecessary blocking or obstructing of such street or highway by the railroad company, whether the obstruction be permanent or only temporary. So held in *Atchison & N. R. Co. v. Garside*, 10 Kan. 552.

LOUISIANA.

Railroads in Streets—Mere Incidental Injuries.

In the absence of any proof that a railroad in a street is improperly constructed or operated, or uses defective machinery, or, in any way, occasions injury not incident to the prudent and lawful exercise of its right, an abutting owner is not entitled to injunctive relief or damages. So held in *Hill v. Chicago, St. Louis & N. O. R. Co.*, 38 La. Ann. 599.

In this case it is said in the opinion: "That some inconvenience is occasioned to plaintiff by the noise of the trains and by the smoke and soot of the engines (which, however, are shown to be as nearly smokeless as any suited to the purpose) and by the jarring of houses, cannot be questioned. So it may be possible that the price of property on the street may have been somewhat impaired by the establishment of this railroad thereon, * * *."

But these are merely consequential injuries for which defendant, who is merely 'doing a lawful act in a lawful manner,' cannot be held responsible."

Compliance with Statute and Ordinances—Absence of Culpable Neglect.

In *Werges v. St. Louis, C. & N. O. R. Co.*, 35 La. Ann. 641, it is held that a railroad company which has laid its tracks on a city street, and runs steam trains thereon, under legislative authority, and with a substantial compliance with city ordinances regulating such use of the street, is entitled to the protection of the law which exonerates a party in pursuit of a legal right from any responsibility for damages not resulting from gross carelessness or culpable neglect.

MAINE.

Usual Noises.

In *Whitney v. Maine C. R. Co.*, 69 Me. 208, it is held that a railroad corporation, under authority to run its trains, has necessarily the right to make all reasonable and usual noises incident thereto, whether occasioned by the escape of steam, rattling of the cars, or other causes.

MASSACHUSETTS.

Elevated Railway—Noise—Compensation.

In *Baker v. Boston Elevated Ry. Co.* (Mass.), 6 R. R. R. 831, 29 Am. & Eng. R. Cas., N. S., 831, 66 N. E. 711, it is held that where it was found that noise incident to the operation of an elevated street railway was such as to constitute a private nuisance, if it were not authorized, such noise constituted special and peculiar damage to abutting property, for which the owner was entitled to compensation, as authorized by Mass. St. 1894, pp. 764, 765, c. 548, §§ 8, 9.

MICHIGAN.

A railroad occupying a street by authority of the legislature is not a public nuisance, and no right of action can arise against the company until by negligence or improper management it does or suffers to be done something injurious to the abutting proprietor which the permission to occupy would not justify. So held in *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62.

In *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, it is said in the opinion: "An adjoining proprietor can never be entitled to recover from a railroad company for the depreciation in the rental or sale

Note

value of his premises because of the location of the track in the street, except upon the assumption that location is of itself unlawful. As already stated, it is unlawful as to him if he owns the soil in the street, but if he does not, and the placing of the track there is permitted by competent authority, the incidental injuries he may suffer from the location of the track and from the proper and reasonable conduct of the business of the railroad company upon it can afford no ground of action unless the statute gives one. In that particular he is on the same footing with all the rest of the community; he may have the incidental benefits without compensation, and he must submit to the incidental losses without redress. The railroad is not a public nuisance, and no right of action can arise against the company until by negligence or improper management they do or suffer to be done something injurious to the abutting owner which the permission to occupy the street would not justify. The general principle here stated has been recognized in the following cases: *Moses v. Pittsburg, etc.*, R. R. Co., 21 Ill. 516; *Murphy v. Chicago*, 29 Ill. 279; *Stetson v. Chicago, etc.*, R. R. Co., 75 Ill. 74; *Chicago, etc., R. R. Co. v. McGinnis*, 79 Ill. 269; *Elizabethtown, etc., R. R. Co. v. Combs*, 10 Bush. 382; *Carson v. Central R. R. Co.*, 35 Cal. 325; *Porter v. North Missouri R. R. Co.*, 33 Mo. 128. It is a legal solicism to call that a public nuisance which is permitted by competent authority. *Harris v. Thompson*, 9 Barb. 350; *Danville, etc., R. R. Co. v. Commonwealth*, 73 Penn. St. 29, and cases cited. The nuisance whether it be public or private, must be found in the subsequent misconduct of the railroad company, and not in their acceptance of the permission to occupy the highway."

MINNESOTA.

Car Barn—Implied Authority—Noises—Proper Location.

In *Romer v. St. Paul City Ry. Co.*, 75 Minn. 211, 77 N. W. 825, it appeared that defendant had for some years maintained and operated by public authority a street car system; that, as a necessary incident to such operation, it had maintained a car barn in a residence portion of the city, with its sides abutting on avenues upon which it was not authorized to operate its system, and had laid tracks and curves on them, over which to run its cars to and from the barn, from early in the morning until late at night; that such operation of its cars over such tracks and curves caused loud and disagreeable noises, whereby the rest and comfort of plaintiff was disturbed, and the rental value of his real estate abutting on the street and avenues was materially reduced. It was held that defendant was authorized by implication to lay and operate the tracks and curves on the avenues; and, as the location of the barn did not appear an improper or unreasonable one, the acts of defendant did not constitute a private nuisance for which the plaintiff could recover damages.

MISSOURI.

Smoke—Standing Cars—Vibration—Exercise of Skill and Care.

In *Randle v. Pacific Railroad*, 65 Mo. 325, it is held that where a railroad track is built in a public street, the escape of soot, smoke, and smells from the locomotives, the obstructions of the street with cars, and the jarring of the earth and neighboring buildings by passing trains, to the inconvenience, discomfort and danger of adjoining proprietors, do not, in law, constitute a nuisance, if the charter of the company authorizes the laying of the track, unless the road is negligently or unskillfully built or operated.

NEW JERSEY.

Incidental Damages—Private Property for Public Use without Compensation—Rule Reconciled with Constitutional Provision.

In *Hayes v. Waverly & P. R. Co.*, 51 N. J. Eq. 345, 27 Atl. 648, it is said in the opinion: "It is unquestionably true that the owner of

Note

abutting property cannot recover damages which are merely incidental to the lawful, careful and skillful operation of a railroad authorized by law. *Beseman v. Pennsylvania R. Co.*, 21 Vr. 235; S. C., affirmed on error, 23 Vr. 221. The reason upon which that rule rests is that the railroad is a public agency for beneficent ends, whose maintenance would be impracticable if all damages incident to its proper operation must be paid: It is perhaps difficult to logically reconcile this rule to the full extent to which its protection may be invoked, with the constitutional requirement that private property shall not be taken for public use without compensation. *Pennsylvania R. R. Co. v. Angel*, 14 Stew. Eq. 316, 330. That which is accepted in this state as the reconciliation is stated in the opinion in *Beseman v. Pennsylvania R. R. Co.* Be this, however, as it may, the rule is established beyond question by this court, at this time. But the rule is not to be carried beyond the limits of strictly incidental damages, it does not extend in the extinction of duty and right growing out of express contract which the land, used for railroad purposes, owes to abutting lands. If the erection or operation of a railroad impairs or destroys such a right, compensation for it must be made. In other words, the immunity does not extend to the sequestration of express rights in the property which the railroad takes into possession, even though those rights may be appurtenant only to neighboring land, which, in their absence, would be obliged to submit to the damage they protect against, without remedy. *Story v. New York Elevated R. R. Co.*, 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596, Lew. Em. Dom. §§ 56, 142."

NEW YORK.

Discomforts Caused by Passing Trains—Only in Very Special Cases.

In *Williams v. New York Cent. R. Co.*, 18 Barb. (N. Y.), 222, it is held that a railroad in a city street is not per se a nuisance; and although individuals residing on the street thus used may be subjected to some inconvenience from the noise, and smoke, and frequently of passing trains, yet it must be a very special and peculiar case in which real estate can be injured by mere noise, or the usual concomitants attending the passage of railroad trains.

Railroad in Street—Mere Consequential Injuries.

The aid of an injunction cannot be invoked to prevent, nor will an action lie to redress, a consequential injury necessarily resulting from the lawful exercise of the right to operate a railroad in a city street granted by the legislature, or conferred by competent municipal authority. So held in *Williams v. New York Cent. R. Co.*, 18 Barb. (N. Y.), 222.

Railroads in Streets—Consequential Damages.

A railroad company, having legislative authority to lay its tracks and operate its road in a city street, in doing this takes no property of one who owns land adjoining the street, but bounded by its exterior line. The company, therefore, is not liable to such owner for any consequential damages to his adjoining property, arising from a reasonable use of the street for railroad purposes, without substantially changing its grade, and which is not exclusive in its nature, but leaves the passage across and through the street free for public use. So held in *Fobes v. Rome, W. & O. R. Co.*, 121 N. Y. 505, 24 N. E. 919.

Disturbing Divine Worship—Public Nuisance—Damages Not Recoverable.

In *First Baptist Church, etc. v. Utica & Sch. Railroad Co.*, 6 Barb. (N. Y.), 313, an action by the trustees of a religious society, against a railroad company, the declaration alleged that the religious society had been disturbed, during divine worship on the Sabbath, in the church edifice, by the noise made by the defendants in the use of their road, by which the property had become very much depreciated in value and rendered unfit for use as a church, and claimed damages therefor. It was held that, although the injuries complained of might

Note

amount to a public nuisance, no action could be sustained by the plaintiff, as owners of the building, for the depreciation in the value thereof; the consequences being too remote.

OHIO.

Railroad Cannot Be a Private Nuisance—Noise and Smoke.

In *Parrot v. Cincinnati, H. & D. R. Co.*, 10 Ohio St. 624, it is held that in respect to the noises, smoke, vapor, or other discomforts arising from the ordinary use of the railroad by the company, the occupant and owner of such lot and dwelling house has no more right to recover damages of the company than any citizen who resides, or may have occasion to pass, so near the street and railroad as to be subjected to like discomforts; and that a railroad authorized by law, and lawfully operated, cannot be a private nuisance.

PENNSYLVANIA.

Where a railroad company has constructed its road in a city, upon property it has acquired, without taking any part of plaintiff's property, it is not liable for indirect injuries to abutting property which are the result merely of the subsequent operation of its railroad in a lawful manner without negligence, unskillfulness or malice. So held in *Pennsylvania R. Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. 690.

Noise—Smoke—Frightening Horses—Injury Not Special.

In *Jones v. Erie & W. V. R. Co.*, 151 Pa. St. 30, 25 Atl. 134, it is said in the opinion: "It is too well settled to need a citation of authorities that mere noise, smoke, dust, and the danger of horses becoming frightened by a moving train is not an actionable injury. Such an exposure is an inconvenience, and sometimes a source of danger, to all persons who live near a railroad, or who have occasion to travel along a street that is crossed by one. Such an inconvenience or danger is common to many persons but special to none. It may be greater to those who live or do business near the line of the road but it affects all who have occasion to come near it, or pass along it, or over or under it is the same in kind, though greater in degree, as the inconvenience arising from the noise, confusion and dust incident to travel upon a paved street or common highway. It is the necessary result of the lawful operation of a railroad and part of the price paid by society for the increased speed and convenience in the transportation of persons and property it affords."

Bridge over Street with Both Abutments on Railroad's Land—Light and Air.

In *Jones v. Erie & W. V. R. Co.*, 151 Pa. St. 30, 25 Atl. 134, it appeared that a railroad company, which owned the diagonally opposite corner lots at the intersection of two public streets, built abutments on its land at each corner, and, with the consent of the city, threw a bridge from one abutment to the other, the height of the bridge above the street being twenty-three feet; that the bridge overhung no land except what was included within the limits of the streets; and that the plaintiff owned a dwelling house situated at one of the other corners. It was held that the only element of damages was the additional servitude, if any, imposed upon plaintiff's property, such, for example as the exclusion of light and air.

Overhead Railroad—Obstruction of Access—Danger of Frightening Teams.

It is not an obstruction of access to property abutting on a street where there is an overhead railroad that persons with wagons or carriages may be deterred from approaching the property from fear that their horses may be frightened by the trains above them. So held in *Jones v. Erie & W. V. R. Co.*, 151 Pa. St. 30, 25 Atl. 134.

Obstruction of Streets—Necessary Number of Trains—Use Unlimited.

In *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339, it is said in the opinion: "A large part of the evidence refers to the danger

Note

encountered by persons obliged to cross the railroad when trains were approaching and the delay and inconvenience caused by cars which totally blocked up the crossing places. If the defendants have the right to make the road on a street, they have also the right to use it when made. They may carry all the freight and passengers they can get. If the number of cars and locomotives necessary to do their business be so great as sometimes to choke the thoroughfare over which they pass, it must be remembered that the same thing would happen in a much greater degree, if the twentieth part of the business were done in carriages, coaches and common road wagons. If the cars are suffered to stand for an unnecessary length of time, at places inconvenient to the public, the act is indictable as a nuisance, and for any want of proper care, the defendants are liable in damages to the persons injured by it. But it cannot be said that they have violated their charter in causing obstructions of this kind, unless such obstructions could have been prevented or diminished by a different construction of the road."

Disturbing Divine Worship—Mere Incidental Inconvenience—Public Interests Paramount.

In *Sparhawk v. Railway Co.*, 54 Pa. St. 401, on an application to restrain a railroad company from running its cars along side a church on Sunday. The court said: "The bill charges an injury, not physical, but mental or spiritual. One which neither deprives the body of rest, refreshment, or health that this is the nature of the complaint is most evident, from the fact that the disturbing causes are the same, and no greater on Sundays than on other days, and of this there is no complaint. How are we to determine whether the mind is injuriously disturbed or not? to some it is granted that there may be annoyance in the passing of cars on Sunday. To others it would be but an agreeable sound. To many it would be an annoyance because of their views of the Sabbath. But, as already said, that is not in this case, for want of power in this form to take cognizance of it. It is not possible, in my judgment, to establish a material injury, where alone at most the mind is disturbed without the slightest bodily effect or interference with ordinary comfort. It is but an inconvenience incident to the situation, and not subject to an adjudication in equity. Progress will not be stopped to accommodate anybody's convenience. It must yield in consideration of our interests in the thousand advantages in other respects of city life. We should not attribute the fault in our own position to faults in others."

Location—Discretion of Directors—Abutting Property—Incidental Annoyances.

In *Struthers v. Dunkirk, W. & P. Ry. So.*, 87 Pa. St. 282, it appeared that the railroad company was authorized by its charter to construct its road to any given point in a certain town; that it constructed its road on a public street immediately in front of plaintiff's premises, who brought suit to recover damages for the inconvenience and annoyance occasioned thereby. It was held that the discretion of the directors of the company in selecting the route of the road could not be inquired into by the court; and that, in the absence of any express provision therefor in its charter, the company was not liable in damages for the annoyance to a property owner fronting on a public street so taken, caused by the passage of trains, the cinders and smoke, and the hinderance to the passage of carriages.

Viaduct—Injury to Property on Other Side of Street—Noise, Smoke and Dust—Absence of Negligence.

A railroad company constructed an elevated viaduct or roadway upon property owned by it in fee, lying on one side of a street, and operated its steam railway thereon. From the noise, smoke and dust caused by the engines and cars, the necessary consequences of the operation of the railroad, injuries resulted to the plaintiff's property on the opposite side of the street, no portion of which property was taken or used in the construction of the viaduct. It was held

Note

that the rule applicable in this case was, that, except on proof of negligence, the lawful use by a railroad company of a lawful erection entirely upon its own property, is not the subject of damage. *Pennsylvania R. Co. v. Lippincott*, 116 Pa. St. 472, 9 Atl. 871.

TENNESSEE.

Sufficient Ingress and Egress.

Abutting owners, who do not own the fee in the street, cannot recover for injuries resulting to them from the lawful and reasonable use of a public street by a railway company, under the permission of the city, where their right of egress and ingress is left reasonably sufficient. So held in *Railroad v. Bingham*, 87 Tenn. 522, 11 S. W. 705.

WISCONSIN.

Incidental Damages—Access.

Incidental damages from the lawful location, construction, maintenance and operation of a railroad in the vicinity of the land of a party, none of whose land is taken, does not constitute a cause of action in his favor: and the fact that the railroad is located on and along a public street does not alter the rule, unless in a case where the location of the railroad is such as to interfere with the right of the owner to access to and from his land out to the street. So held in *Hanlin v. Chicago & N. W. Ry. Co.*, 61 Wis. 515, 21 N. W. 623.

(b) Authorities Limiting Application of Rule.**Federal Cases.****Obstructing Street—Standing Cars—Running Trains—Signals.**

In *Frankle v. Jackson* (C. C.), 30 Fed. Rep. 398, it is held that although a company has acquired the right to lay a track along a street, and run its trains thereon, yet, if it leaves its cars standing on the track so as to improperly obstruct travel, the abutting lot owners may recover for such improper use of the street. But it is not an improper use of the street to run trains at night as well as during the day, to run heavy freight trains, and to ring bells and sound whistles.

Railroad Hydrant—Interfering with Divine Worship—Necessary Structure—Lawful and Proper Operation.

In *Chicago G. W. Ry. Co. v. First Methodist Episcopal Church*, (C. C. A.), 102 Fed. 85, it is held that the construction of a railroad water hydrant in a street immediately opposite the center of a church, and only thirty-five feet distant, and of a station and property on the opposite side of the street, so that noises and odors and the dust and smoke incident to the stopping and starting of trains at both station and hydrant interfere with services in the church, and render the building unfit for the uses for which it was built, constitutes a private nuisance, which amounts, in legal effect, to a taking of the church property to the extent of the injury done thereto, for which the company may be required to make compensation, and it is no defense to an action for the recovery of such compensation that the structures built by the railroad company are necessary for the operation of its road, or that its trains are operated in a lawful and proper manner.

Invasion of Abutting Premises—Mere Absence of Physical Invasion.

In *Chicago G. W. Ry. Co. v. First Methodist Episcopal Church* (C. C. A.), 102 Fed. 85, it is said in the opinion: "There is no such thing as a natural person or a private corporation having a 'lawful right' to invade the premises of an abutting owner, and appropriate his property, and there is no difference in principle between an actual physical invasion of one's property and the creation and maintenance of a nuisance which has the effect to deprive him of his beneficial use."

Railroad in Street—Property "Damaged"—Constitutional Provision.

In *Frankle v. Jackson* (C. C. A.), 30 Fed. 398, it is held that a constitutional provision guaranteeing compensation to the owner of prop-

Note

erty "damaged" by the public use, entitles the owner of a lot abutting on the street to recover damages of a railroad company diminishing the value of the lot by laying tracks and running its trains through the street in front of the lot.

CONNECTICUT.

Cross-Over Switch—Special Injury.

Where an owner of property abutting on a street suffers annoyance from the maintenance by a street railway company of a cross-over switch, which annoyance is not merely an ordinary incident to the use by the company of double tracks and a cross-over switch, but is peculiar and exceptional because of the physical or other conditions existing at the particular place, equity will give redress. So held in *State ex rel. Howard v. Hartford St. Ry. Co. (Conn.)*, 11 R. R. 838, 34 Am. & Eng. R. Cas., N. S., 838, 56 Atl. 506.

DISTRICT OF COLUMBIA.

Loading and Unloading Cars in Street—Offensive Odors—Smoke—Vibration.

In *Neitzey v. Baltimore & Potomac R. Co.*, 5 Mackey (D. C.), 34, 26 Am. & Eng. R. Cas. 553, it is held that the privileges conferred by the acts of Congress authorizing the defendant railroad to lay necessary tracks at or near its depots or stations are privileges conferred by competent authority; and, therefore, any inconvenience which may result to private parties from their careful and skillful exercise is *damnum absque injuria*: but that the company is not authorized to convert the streets and avenues of the city into freight yards by loading and unloading their cars thereon and leaving them there when not in use: still, if no private inconvenience to anybody results therefrom, it is simply an indictable nuisance and not a private one; but that when these cars have been used for the conveyance of offensive matter so as to infect the whole atmosphere with noxious odors, and when the freight loaded and unloaded there consists of similar material and the process of bringing the cars there and taking them away for the purpose of loading and unloading causes annoyance by jarring the neighboring houses, and the smoke from the engines penetrates the dwellings, all this then becomes more than a public nuisance; it becomes a private one.

INDIANA.

Improper Exercise of Right to Use Street.

A railroad in a city street is not of itself a nuisance, but an improper and unreasonable exercise of a right to use a street by a railroad company may become a nuisance. So held in *State v. Louisville, N. A. & C. Ry. Co.*, 86 Ind. 114, 10 Am. & Eng. R. Cas. 286.

KENTUCKY.

Noise—Smoke and Fire—Actual Contact.

The depreciation of the value of property by reason of the construction and operation of a railroad through an adjacent street, or annoyance from noise necessarily attending the same, is no ground for an action by the land lot owner, nor is an annoyance from smoke and fire, unless he is damaged by their actual contact with his premises. So held in *Cosby v. Owensboro & R. R. Co.*, 73 Ky. 288.

Excavation—Soot and Cinders Falling upon Property—Vibrations—Diminution in Value from Mere Proximity of Railroad.

In an action against a railroad company to recover damages for injury to abutting property resulting from the construction and operation of a railroad along the streets of a city, there can be a recovery for injuries caused by a cut, or from the falling of soot and cinders upon the property, or from smoke entering the house, or from vibrations of the running trains, but for a diminution of the

Note

value of the property caused by resulting from a mere dislike of residing near a railroad, or from smoke, cinders and soot as would fall on the property by reason of the currents of wind, there can be no recovery. So held in *Henderson Belt R. Co. v. Dechamp*, 95 Ky. 219, 24 S. W. 605.

Streets—Rights of Lot Owners—Incorporeal Hereditament.

In *Elizabethtown, L. & B. S. R. Co. v. Combs*, 73 Ky. 382, it is held that there is a large class of cases in which no recovery can be had for injuries to adjacent property from the construction of public improvements in the streets of towns and cities, the lot owner holding subject to the right of the public to use the streets for any purpose not inconsistent with the uses for which they were dedicated; but lot owners have a peculiar interest in the adjacent street, which neither the local nor general public have, in the nature of an incorporeal hereditament—a franchise, the right to which is as inviolable as the property in the lots themselves.

Turntable—Injuries Not Incidental to Usual Operation.

In *Louisville Ry. Co. v. Foster*, 108 Ky. 743, it is held that for any substantial injury to property fronting on a city street, arising from the location or operation of a turntable or cars, that is not fairly incidental to the usual operation of a street railway, and borne by the property owners, generally along the line, there may be a recovery.

Construction and Operation of Two Tracks under Authority to Construct Only One.

In *Klosterman v. Chesapeake & O. Ry. Co. (Ky.)*, 5 R. R. R. 726, 28 Am. & Eng. R. Cas. N. S., 726, 71 S. W. 6, it appeared that a railroad company concurrently constructed and operated two tracks in a street; and it had legislative and municipal authority to construct and operate only one track. It was held, in an action by an abutting owner for damages to his property, brought after the right to sue for damages arising from the construction and operation of the track authorized by law was barred, that the measure of recovery was the damages sustained by reason of the construction and operation of the two tracks, less the damages which would have been caused by the construction and operation of only one track.

Special Inconvenience and Discomfort.

In *Willis v. K. & I. Bridge Co.*, 104 Ky. 186, it is said in the opinion: "Wherever a railroad company has been granted authority to use a street, it is accompanied with an implied qualification that its use shall not unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Such a grant does not license the railroad company to use the street in disregard of the private rights of others, and with immunity for their invasion. Legislative authority to so use a street does not deprive a citizen of a right to maintain an action for damages for any special inconvenience and discomfort not experienced by the public at large."

Obstructing Trains.

In *Elizabethtown, L. & B. S. R. Co. v. Combs*, 73 Ky. 382, it is held that where a railroad has been so located in a street as to deprive the owner of an adjacent lot of the means of ingress and egress to and from his lot with ordinary vehicles on either side of the road when trains are passing or standing in the street, he may recover from the railroad company such damages as he has thereby sustained.

MINNESOTA.

Pollution of Air—Depreciation of Rental Value—Damages—Injunction.

As the owner of a lot abutting on a street has, as appurtenant to the lot, and independently of the ownership of the fee of the street, an easement in the street, to its full width, in front of his lot, for the purposes of access, light, and air, which constitutes property, therefore the maintenance and operation of a railroad on any part

Note

of the street in front of his lot, so as to pollute the air, and thus depreciate the rental value of the premises, constitutes a positive invasion of property rights, for which the owner may maintain a private action; and where his legal right is clear, and the nuisance or trespass a continuing one, he may maintain an action to enjoin it. So held in *Gustafson v. Hamm*, 56 Minn. 334, 57 N. W. 1054.

Railroad in Street—Smoke and Cinders—Damages Recoverable.

Whenever without the abutting lot owner's consent, and without compensation to him, a commercial railroad is laid and operated along the portion of the street in front of his lot so as upon that part of the street to cause smoke, dust, cinders, etc., which darken and pollute the air coming upon the lot from that part of the street, the lot owner may recover whatever damages to his lot are caused by so laying and operating the railroad. So held in *Adams v. Chicago, B. & N. R. Co.*, 39 Minn. 286, 39 N. W. 629.

Access—Light and Air.

But in *Lamm v. Chicago, St. Paul, M. & O. R. Co.*, 46 Am. & Eng. R. Cas. 42, 45 Minn. 71, 47 N. W. 455, it is held that in estimating damages to a lot caused by the construction and maintenance of a railway in the street in front of the premises, but beyond the center line thereof, only such injuries to the property should be considered as proximately result from interference with the appurtenant easement for purposes of access, light and air which the owner has in that part of the street.

MISSISSIPPI.

Access to Premises—Obstruction—Noise from Running Trains—Malodorous Freight.

Under a constitutional provision that "private property shall not be taken or damaged for public use except on due compensation being first made," etc., an abutter on a street, the fee of which is owned by the city, may recover damages against a railroad company whose track, although authorized by the city, is, as operated, a nuisance; obstructs access to the abutter's premises, and diminishes the value of his property as a residence by the noises of the trains and the stenches from live stock in transportation thereon. So held in *Alabama & V. R. Co. v. Bloom*, 71 Miss. 247, 15 So. 72.

MISSOURI.

Ingress and Egress—Municipal License.

A city cannot lawfully grant to a railroad company such use of a street as will destroy its usefulness as a public thoroughfare, or as will destroy, or unreasonably interfere with, the right of an abutting owner to go across to and from his property so held in *Knapp, Stout & Co. v. Transfer Ry. Co.*, 126 Mo. 26, 28 S. W. 627.

MONTANA.

Noise—Smoke—Vibration—Special Damage—Constitutional Provision.

In *Root v. Butte, A. & P. Ry. Co.*, 20 Mont. 354, 51 Pac. 155, it is said in the opinion: "The weight of authority is that under a constitutional provision such as sec. 14, art. 3 of the Montana constitution, to the effect that private property shall not be taken or damaged for public use without just compensation having been first made or paid into court for the owner, it is not necessary that there be any physical invasion of an individual's property for public use to entitle him to compensation. (*O. & N. Railroad Co. v. Janeczek*, 30 Neb. 278, 46 N. W. 478.) We believe, therefore, that if plaintiff's property has been lessened in value by the running of trains or by smoke, or whistles or noise of locomotives, or in other ways, on account of the construction and operation of appellant railroad in close proximity to his property, and such damage is in excess of that

Note

sustained by the community at large, he has sustained special damages and a recovery may be had."

NEW JERSEY.

Terminals in City—Operation—Least Annoyance Possible.

Where a railroad company acquires land for terminal purposes in the heart of a city, it cannot use such land in disregard of the comfort and property of others. It must adjust its operations so as to produce the least annoyance possible. So held in *Ridge v. Pennsylvania R. Co.*, 58 N. J. Eq. 172, 43 Atl. 275.

Deprivation of Ordinary Enjoyment of Property—Compensation.

The grant to a railroad company of the right to use a public street does not give it any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be made to the owners. So held in *Thompson v. Pennsylvania R. Co.*, 45 N. J. Eq. 870, 14 Atl. 897.

NEW YORK.

Ingress and Egress—Light and Air—Necessary and Unnecessary Obstructions—Special Damages.

In *Greene v. New York Cent. & H. R. R. Co.* (N. Y. Superior Ct.), 65 How. Prac. 154, it is held that any use of a street, though a new one, which does not materially abridge or obstruct the right of passage and repassage, of ingress and egress, and to light and air of the abutting owner, gives no cause of action; but every unnecessary material abridgment or obstruction, though of a temporary character, and every continuous material abridgment or obstruction, though made in the pursuit of a lawful business, and to some extent called for by circumstances arising in the course of such business by which the right of an abutting owner to pass and repass, to have free access to and egress from his premises, and to enjoy the light and air from the street, is unreasonably affected, gives to the injured party, in case of special damages therefrom a right to action against the offending party for the recovery of the damages actually sustained.

Turntable—Unreasonable Construction and Use—Injury to Adjoining Premises.

In *Garvey v. Long Island R. R. Co.*, 159 N. Y. 323, 54 N. E. 57, it is held that the general statutory power to construct and operate a steam surface railroad does not authorize such an unreasonable construction and use of a turntable in a terminal yard, in the vicinity of an inhabited dwelling on adjoining private property, as to seriously, continuously and permanently injure the adjoining premises and impair their enjoyment, without compensation, and if a turntable is so used as to have that effect, such use constitutes a nuisance which may be enjoined.

OHIO.

Noise, Smoke and Sparks.

In *Columbus, H. V. & T. R. Co. v. Gardner*, 45 Ohio St. 309, 13 N. E. 69, 32 Am. & Eng. R. Cas. 243, it is held that in an action by the owner of property abutting on a public street of a municipal corporation, which is occupied by a railroad track under an agreement with the municipal authorities, by virtue of section 3283 Rev. St. to recover against the railroad company for injury to such property by the laying of the track, it is competent to take into consideration evidence of substantial injury and loss to the property, not common to the community at large, caused by noises, smoke, and sparks occasioned by the running of trains in front of the property.

TENNESSEE.

Ingress and Egress—Excessive Use of Street.

If a railroad company lawfully located upon a street in a city, un-

Note

der its charter, and by permission of the local government, uses the street in the operation of its road beyond what is necessary for the proper running of its trains, and by such excessive and improper use substantially destroys the easement of way, and of ingress and egress appurtenant to an abutting lot, the owner of such lot can maintain successive actions for such nuisance. So held in *Harmon v. Louisville, etc., R. Co.*, 87 Tenn. 614, 11 S. W. 703.

Ingress and Egress—Obstruction—Excessive Use—Conformity to Established Grade.

In *Smith v. East End St. Ry. Co.*, 87 Tenn. 626, 11 S. W. 709, it is held that street railway companies have no right of eminent domain, and can acquire no right by contract with the city to obstruct, for purposes of its construction, the right of ingress and egress appurtenant to the abutting lots, even where the owners thereof have no fee in the street; but construction of the railway upon the city's established grade of the street, under a lawful contract with the city authorities, and in a lawful manner, exonerates the company from liability, in this particular, to the abutting owners; but after the railway has been lawfully constructed the company is liable to abutting owners for any damages resulting to them from the unlawful or excessive use of the road.

WEST VIRGINIA.

Where a railroad is laid down in a public street, the abutting property is damaged within the meaning of section 9, art. 3 of the West Virginia constitution to the extent of the depreciation of the market value of the property, caused by the railroad company laying their track and running their trains in the street. So held in *Stewart v. Ohio River R. Co.*, 38 W. Va. 438, 18 S. E. 604.

In *Guinn v. Ohio River R. Co.* (W. Va.), 13 Am. & Eng. R. Cas., N. S., 437, it is held that though a railroad company has authority from the city to build its road in a street, yet it is liable to an adjoining lot owner for injuries flowing from its construction and operation.

Abutting Property—Permanent Damages—Incidental Injuries.

Lot owners, whether they own the fee in the street or not, may by an action at law recover of a railroad such damages as they might have recovered in a common-law suit, had the railroad company built its road in the street without proper authority; for while the road has been built by proper authority conferred directly by the legislature or the proper municipal authorities, it cannot be regarded as a nuisance when operated in a proper manner, yet, under the state constitution, the company is liable for the permanent damages it inflicts on abutting property in the same manner as if it had built its road without proper authority; but after it has been sued for such damages it is not liable to be sued for the nuisances, which necessarily result from the running of its cars through the street, for in so doing it is only exercising its rights and is not committing a nuisance. So held in *Spencer v. Point Pleasant & O. R. R. Co.*, 23 W. Va. 406.

b. Injuries from Construction of Railroads in Streets.

UNITED STATES.

Elevated Railway Posts—Authorized Location.

In *Currier v. Westside Elevated Patent Ry. Co.* (C. C.), 6 Blatchf. 487, Fed. Case No. 3493, it appeared that plaintiff owned premises at the northeast corner of certain streets, in the city of New York; that a corporation erected in one of the streets in front of the premises, but outside of the lines thereof, one or more posts on which to lay an elevated railway; and that the city had theretofore exercised acts of ownership over the soil of the last mentioned street. It was held that as the legislature had authorized the construction of the railway, in the manner in which it was being constructed, such con-

Note

struction would not be enjoined on the ground that it was a nuisance.
Elevated Railroad—Discomforts and Inconvenience—Damages.

In *New York El. R. Co. v. Fifth Nat. Bank*, 135 U. S. 432, it is held that an abutter on a street in the city of New York may recover against a company constructing an elevated railroad and station house in front of his building, damages for the discomforts and inconveniences in the occupation of the building caused by the erection of the defendant's structure, independently of the running of trains thereon.

Consequential Injuries—Constitutional Provision.

In *Hot Springs R. Co. v. Williamson*, 136 U. S. 121, it is held that when a state constitution provides that "private property shall not be taken, appropriated or damaged for public use without just compensation" a railroad company constructing its road in a public street, under a sufficient grant from the legislature or municipality, is, nevertheless, liable to abutting owners of land for consequential injuries to their property resulting from such construction.

Special Injury—Compensation.

In *Chicago G. W. Ry. Co. v. First Methodist Episcopal Church* (C. C. A.), 102 Fed. 85, it is held that the use of a public street cannot be granted to a railroad company for uses which constitute a private nuisance, and result in special injury to the owners of abutting property except upon making compensation for such injury.

ALABAMA.

Electric Railway—Injunction.

In order to entitle owners of property abutting on the street in which it is proposed to lay an electric railway to restrain the construction of the same, it is incumbent upon them to show a nuisance in fact, and that they would suffer special injury, different from that sustained by the general public. So held in *Baker v. Selma Street & Suburban Ry. Co.* (Ala.), 7 R. R. R. 506, 30 Am. & Eng. R. Cas., N. S., 506, 33 So. 685.

Unauthorized Construction of Track on Embankment—Right of Abutter to Enjoin.

In *Columbus & W. R. Co. v. Witherow*, 82 Ala. 190, 3 So. 23, it is held that an injunction will be granted to restrain a railroad from the unauthorized construction of a track on an embankment along the public street of an incorporated town, whereby the property of an adjoining owner is injured.

CALIFORNIA.

Ingress and Egress.

In *Schulte v. North Pac. Trans. Co.*, 50 Cal. 592, it is held that if, in front of a lot in a city, in a condition to be used as such, a structure is placed on the street by which its use as a highway is impeded, and which prevents the owner of the lot from having free access to the street therefrom, he may maintain an action in his own name against the person maintaining the obstruction to abate it as a nuisance, and to recover damages.

CONNECTICUT.

Excavation—Embankment—Lateral Support—Light—Consequential Damages Not Included in Award.

In *Bradley v. New York & N. H. R. Co.*, 21 Conn. 294, it was alleged that the railroad company had made a large excavation for their roadbed in the land adjoining plaintiff's, and so near his building and so deep as to weaken its foundation, and render it unsafe for use, and raised in the street, opposite to and near the front of said building, an embankment of much greater height than the street was before, thereby obstructing the passage to and from his building, darkening the windows, obstructing the air and rendering the build-

Note

ing unfit for occupation. It was held that such acts did not constitute a taking of plaintiff's property; but that the injuries resulting from such acts were incidental or consequential damages from the authorized work, and, as no compensation had been made for injuries of this character, plaintiff was entitled to recover therefor.

FLORIDA.

Streets—Change of Grade—Consequential Injuries—Not a Taking.

The constitutional guaranty that private property shall not be "taken" or "appropriated" for public use without compensation, does not extend to mere consequential damages resulting to property abutting on a street from a change of grade of the street, or other improvement thereof not constituting a diversion of the street from street purposes, by municipal authorities acting within the scope of their charter powers, but only to a trespass upon or physical invasion of the abutting property. So held in *Selden v. City of Jacksonville*, 28 Fla. 558, 10 So. 457.

Horse Railway.

A horse railway in a city street, constructed under legislative authority, and with the consent of the city, is not a nuisance, if it be laid down in the most approved mode of constructing such roads. So held in *Randall v. Jacksonville Street R. R. Co.*, 19 Fla. 409, 17 Am. & Eng. R. Cas. 184.

GEORGIA.

Stagnant Water—Private as Well as Public Nuisance.

In *Savannah, F. & W. Ry. Co. v. Parish*, 117 Ga. 893, 45 S. E. 298, it is held that even though a pool of stagnant water in a city may be a public nuisance, a citizen suffering special damage by reason of sickness of himself or family, or depreciation of his property, as the result thereof, has a cause of action against the party creating or maintaining the nuisance.

ILLINOIS.

Railroad in Street.

A railroad track constructed upon a public street of a city by legislative authority, properly constructed and operated, is not, in law, a nuisance. So held in *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460.

Railroad as Public Agent—Location Not Inconsistent with Public Use.

Where the legislature authorized the board of directors of a railroad company to locate and construct their road along and across the public grounds and streets of an unincorporated town, and the company, in pursuance of that authority, did so locate and construct their road, they were to all intents and purposes public agents in so doing, and such location was the act of the state, and within the legislative authority, unless such location was inconsistent with the use to which such public ground had been previously applied by the legislature. So held in *Chicago, R. I. & Pac. R. Co. v. City of Joliet*, 79 Ill. 25.

Exclusive Control in City—Injunction—Damages.

In *Moses v. Pittsburgh, F. W. & C. R. Co.*, 21 Ill. 516, it is held that where the municipal authorities are vested with exclusive control over the streets, as in the city of Chicago, and those authorities grant permission to locate railway tracks along a street, the owners or occupants of property fronting on such street, cannot enjoin the laying of such tracks, nor receive any damage or compensation for such use of a street.

INDIANA.

The owner of an abutting lot, whose title extends to the middle of

Note

a highway forty feet wide, cannot maintain an action for damages for an unlawful obstruction on the opposite side, caused by the construction thereon of an embankment, eleven feet in width, by a railroad company for a roadbed, the only effect of which is to render access to his property more difficult and inconvenient, and to force the travel on the highway nearer to his lot, as the injury is the same in kind as that suffered by the community in general, differing only in degree. So held in *Indiana, B. & W. Ry. Co. v. Eberle*, 110 Ind. 543, 11 N. E. 467.

Portion of Street Released to Railroad—Additional Rail on Ties—Additional Impairment of Use of Street—Injunction.

In *Indianapolis & St. L. R. Co. v. Calvert*, 110 Ind. 555, 11 N. E. 476, it appeared that the owner of a corner lot, for a valuable consideration, released to a railroad company the part of the streets adjoining his property, to the center line, for right of way, "to be occupied by one track, as now located." In constructing a switch the company proposed to lay one rail thereof for a distance of nineteen feet in front of the lot and near the intersection of the streets, on the projecting ends of the ties on which the main track was laid, and fourteen inches from the main rail. It was held that in the absence of a showing that such occupation of the ties of the main track will impose any additional burden upon the plaintiff's soil, or will prevent any additional impairment or interference with his use of the streets, injunction would not lie.

Obstruction of Street—Special Injury.

In *Chicago, St. L. & P. R. Co. v. Eisert*, 127 Ind. 156, 26 N. E. 759, it is held that a private individual may maintain an action because of an obstruction of a public street where such obstruction peculiarly affects him, although it does not affect the general public.

IOWA.

Where a railroad company has been properly authorized to construct a bridge and its approaches on and over a public street the company is not liable for consequential damages resulting from their construction to a lot owner, in front of whose property an embankment had been thrown up in the proper construction of the bridge and approaches. So held in *Staten v. Des Moines Valley R. Co.*, 29 Iowa 148.

Failure to Compensate—Injunction.

In *Harbach v. Des Moines & K. C. Ry. Co.*, 80 Iowa 593, 44 N. W. 348, it is held that the construction and maintenance of a railroad in a city street, without ascertaining and paying damages to the abutting lot owner, was a nuisance, which entitled him to have abated by injunction.

Depot in Street.

Although no permanent obstruction like a depot building can be erected on the streets of a town, yet it is held, in Iowa, that streets may, by public authority, be occupied by railroads without the consent of the adjacent proprietors, and without compensation, irrespective of the ownership of the fee of the streets. *Barney v. Keokuk*, 94 U. S. 324.

KANSAS.

Embankment at Crossing—Travel Obstructed and Diverted.

Where a railroad constructed along a street crosses an avenue on an embankment nine or ten feet, destroying the use of the avenue, obstructing travel, and diverting it therefrom it is liable in damages to one whose lot faces on the avenue sixty feet from the crossing. So held in *Dairy v. Iowa Cent. Ry. Co.*, 113 Iowa 716.

Failure to Ballast Roadbed—Ingress and Egress Not Destroyed—Absence of Evidence of Conditions of Privilege.

In *Wichita & Colorado Ry. Co. v. Smith*, 45 Kan. 264, 25 Pac. 623,

Note

it is held that the failure alone of a railroad company to properly ballast its roadbed, where sufficient space is left in the street for ordinary vehicles and teams to pass in front of abutting property, will not authorize a recovery for damages alleged to have been sustained by the destruction of one's right of ingress and egress, where there is no evidence to show the terms and conditions upon which the privilege to build the railroad was conferred by the city.

Railroad in Street—Not Deprived of Access to Property.

An abutting lot owner cannot recover damage by reason of the location of a railroad, duly authorized by the city council, along one of the regularly laid out streets of a city, unless there has been a practical obstruction of the street in front of his premises and he is virtually deprived of access to his property. So held in *Wichita & Colorado Ry. Co. v. Smith*, 45 Kan. 264, 25 Pac. 623.

Railroads in Streets—Necessary Alterations in Street Surface—Unnecessary Obstructions.

In *Ottawa, O. C. & C. G. R. Co. v. Larson*, 40 Kan. 301, 36 Am. & Eng. R. Cas. 163, it is held that a railroad company, under authority of law, may construct and operate its railroad in a public manner, making such alterations in the surface of the street as are necessary to the construction and operation of its road; and which do not necessarily impair the usefulness of the street, without being liable to abutting lot owners or others for damages; but such a company cannot any more than an individual, wrongfully and unnecessarily block up or obstruct a street without being liable therefor.

Mere Consequential Injuries—Compensation Not Provided for—Constitutionality of Statute.

In *Ottawa, O. C. & C. G. R. Co. v. Larson*, 40 Kan. 301, 36 Am. & Eng. R. Cas. 163, it is said in the opinion: "A constitutional right to compensation for private property taken for public use does not extend to instances where the land is not actually taken, but only indirectly or consequentially injured; and an act or an ordinance authorizing the construction of a railroad, or other work of a public nature upon a public street or highway, the fee of which is in the public, is not unconstitutional because it does not provide for compensation for injuries to abutting lot or land owners."

KENTUCKY.

Appropriating Street to Other Uses—Encroaching on Private Property—Compensation—Consent of Property Owners.

In *Lexington & Ohio R. Co. v. Applegate*, 8 Dana (Ky.), 289, it is held that neither a municipality nor the legislature can either license a private nuisance, or take or encroach on private property, without the owner's consent, or the payment to him of adequate damages, or appropriate a public street to any use to which it was not originally dedicated, unless the consent of all those immediately interested in such street shall be given, or just compensation shall be first made to them.

Ingress and Egress—Taking Property.

In *Elizabethtown, L. & B. S. R. Co. v. Combs*, 73 Ky. 382, it is held that if an appropriation of a street, even by legislative and municipal sanction, unreasonably abridges the rights of adjacent lot owners to use the street as a means of ingress and egress, they are thereby deprived of a property right without compensation, and an action will lie against the person, or corporation guilty of usurping such unreasonable and exclusive use, for such immediate and direct damages as the owner may sustain.

LOUISIANA.

Public Not Excluded from Any Part of Street.

In *Werges v. St. Louis, C. & N. O. R. Co.*, 35 La. Ann. 641, it is held that the legislature has the power to authorize the building of

Note

a railroad, using steam engines on a street of a city, provided the road be so constructed as not to exclude the public from any part of the street.

Streets—Use Unnecessarily Injurious.

In *Laviosa v. Chicago, St. Louis & N. O. R. R. Co.* (La.), 4 Am. & Eng. R. Cas. 128, it is held that a remedy will be afforded against the use of streets by railroads, in a manner unnecessarily injurious to private persons, even though such particular mode of use is expressly authorized by municipal ordinance.

MAINE.

Injuries Indirectly Resulting.

In *Rogers v. Kennebec & Portland R. Co.*, 35 Me. 319, it is held that for injuries to property, indirectly resulting from the lawful construction of a railroad, the law affords no remedy.

Excavations—Necessary Change of Grade.

In *Whittier v. Portland & K. R. Co.*, 38 Me. 26, it is held that where a railroad company constructs its track across a highway in accordance with the directions and orders of the county commissioners, no action can be sustained against it for damages suffered in consequence of their excavations, by the owner of the adjoining land; and that it will not be liable for any damages to such owner from the necessary acts of the offices of the town in grading down the highway in consequence of the construction of the railroad across it.

MARYLAND.

Street Railway—Consequential Injuries—Not a Taking.

Where the construction of a street railway is authorized by competent authority, and there is no invasion of, or physical interference with the property of an abutting owner, there is no taking of such property within the meaning of the Maryland constitution, and no injunction will be granted to prevent consequential injuries resulting therefrom. So held in *Poole v. Falls Road Electric Ry. Co.*, 88 Md. 533, 41 Atl. 1069.

Railroad in Street—Not a Taking—Injunction.

In *O'Brien v. Baltimore Belt R. Co.*, 74 Md. 363, 22 Atl. 141, it is held that the depreciation of the property of an abutting owner in consequence of the construction of a railroad along the street which in no way interferes with access to the property, is not such taking of private property for public use as is forbidden by the state constitution, except upon payment of compensation being first made; and the owner who has no freehold or leasehold estate in the bed of the street, is not entitled to have the construction of the railroad restrained, as there is an adequate remedy at law.

Electric Railway—Narrow Street—Not a Taking—Injunction.

The construction of an electric railway, under legislative authority upon a street which is so narrow that there is not sufficient space for vehicles to pass or stand between the curbstone of the pavement and the tracks, is not such a taking of the property of the abutting owner as entitles him to enjoin the making of the road, when so authorized, as a public nuisance. So held in *Poole v. Falls Road Elec. Ry. Co.*, 88 Md. 533, 41 Atl. 1069.

Lateral Support—Natural Consequence of Authorized Act.

As against a private corporation the owner of a lot of ground with a building thereon, bounding on a street, is entitled to the natural support which the bed of the street may afford to the foundation of his house. And notwithstanding authority may have been obtained both from the city and the state legislature to make the extraordinary use of the street, yet that authority must be exercised at the peril of the party to whom it is delegated; and if any injury occurs to private property in the exercise of the power, the party producing

Note

it must be held liable. And such liability arises even though the injury is the natural or inevitable result or consequence of the act authorized to be done. So held in *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117.

MASSACHUSETTS.

Depreciation in Value of Nonabutting Property.

In *Proprietors of Locks and Canals v. Nashua & L. R. Corp.*, 10 Cush. (Mass.), 385, it is held that depreciation in the value of real estate not abutting on a railroad, caused by laying a railroad across the street leading thereto, is not damages recoverable as they are too remote and consequential.

In this case it is said in the opinion: "The law does not propose to grant indemnity for all losses occasioned by the laying of a railroad. If it did, it would extend to turnpikes and canals, the value of which is diminished or destroyed by loss of custom: to taverns and public houses deserted or left in obscurity; to stage coach proprietors and companies; to owners of dwelling houses; manufactories, wharves, and all other real estate, in towns and villages, from which a line of travel has been diverted. If it can extend to the next estate beyond the one closed or touched by the railroad, why not to the next, and the next, which may be affected less in degree, but in the same manner."

MICHIGAN.

Access to Nonabutting Property Rendered Less Convenient.

In *Buhl v. Union Depot Co.*, 98 Mich. 596, 57 N. W. 829, it is held that the injury sustained by a land owner whose land fronts upon a public street, but not upon that portion occupied and closed by a union depot company under statutory authority, and whose means of ingress and egress are not thereby cut off, but only rendered less convenient, is *damnum absque injuria*, and damages are not recoverable under a statute which provides that, in case of such occupancy and closing, the company shall pay all parties entitled to the same any and all damages that may occur to them in consequence thereof.

MINNESOTA.

Access to Property Materially Interfered with.

If a railroad, not touching one's premises, obstructs a street abutting on or leading to them, so as to cut off or materially interfere with the only access to them, the inconvenience is deemed to be special, and not common to the public, and an action lies. So held in *Brakken v. Minnesota & St. Louis Ry. Co.*, 29 Minn. 41, 11 N. W. 124.

MISSOURI.

Authority to Construct Bridge—Pier in Street—Injunction—Compensation—Special Injury.

Under a charter authorizing a city to direct and control the construction of bridges, the erection in a street of a pier authorized by the city is not a nuisance which can be enjoined by an abutting property owner; and he must show that the damages sustained by him by reason of the structure are peculiar to himself and different in kind from those suffered by the rest of the community to entitle him to the protection of the constitutional provision that private property shall not be damaged for public use without compensation. So held in *Gates v. Kansas City Bridge & Term. Ry. Co.*, 111 Mo. 28, 19 S. W. 957.

NEW HAMPSHIRE.

Bridge over Railroad—Consequential Damages.

An action will not lie against a railroad company for consequential damages arising from building a bridge over their railroad, in accordance with statutory provisions. *Towle v. Eastern R. Co.*, 17 N. H. 519.

Note

NEW JERSEY.

Unauthorized Location—Right of Lot Owner to Enjoin.

The location of a railroad through a public street in a line not warranted by law will not be enjoined at the instance of the owner of an unimproved building lot suffering no present detriment. *Zabriskie v. Jersey City & B. R. Co.*, 13 N. J. Eq. 314.

NEW YORK.

Grading Streets—Doctrine Equally Applicable to Construction of Railroad.

In *Bellinger v. New York Cent. R. Co.*, 23 N. Y. 42, it is said in the opinion: "Where persons are authorized by the legislature to perform acts in which the public are interested, such as grading, leveling and improving streets and highways and the like, and they act with proper care and prudence, they are not answerable for the consequential damages which may be sustained by those who own lands bounded by the street or highway. The doctrine is equally applicable to the construction of a railroad by a private corporation, for the enterprise is a public one, and the authority is conferred for the public benefit."

Raising Grade—Rights of City Conferred upon Railroad.

Where a city can raise the grade of a street without liability to abutting owners, it can authorize a railroad company to do so without such liability. So held in *Uline v. New York Cent. & H. R. R. Co.*, 101 N. Y. 98, 4 N. E. 536, 23 Am. & Eng. R. Cas. 3.

Right to Prevent Construction.

In *People v. Kerr*, 37 Barb. (N. Y.), 357, it is held that neither the people nor individual property owners abutting on a street can restrain a railroad company which is authorized by law to construct a railroad on the street, nor the city from giving its consent to such construction.

Temporary Obstruction during Construction of Railroad—Injuries Peculiar to Certain Property.

An authorized railroad in a city is not, per se, a nuisance. When its construction is authorized, that legalizes the temporary obstruction to the public, caused by the proper prosecution of the appropriate work, and would prevent any effectual action by individuals on account of consequential injuries to their property, although it might be peculiar to them, which would necessarily result from it. So held in *Wetmore v. Stoy*, 22 Barb. (N. Y.), 414.

Proper Construction—Incidental Injuries.

In *Corey v. Buffalo, C. & N. Y. R. Co.* (N. Y.), 23 Barb. 482, it is held that where land has been dedicated by the owner, to the public, for a street or highway, the title, for the time being, is in the people of the state; and that if the legislature authorizes the construction of a railroad through such street or highway, and the road is constructed accordingly, in a proper manner, if the owners of property on such street suffer loss or damage in consequence of the construction of the railroad, it is *damnum absque injuria*.

Track Near Sidewalk—Inconvenience in Using Access to Abutting Property.

The owners of property abutting on a city street, having an easement in the street, in common with the whole people to pass and repass, and also a right to free access to their premises, cannot recover for the mere inconvenience in using such access caused by the lawful use of the street by a railroad, and therefore a complaint alleging that defendant laid its track so near the sidewalk, in front of his premises, as not to leave sufficient space for a vehicle to stand, and that he and his family are thereby incommoded in leaving and returning to their residence, and the rental value of his premises is greatly depreciated, did not state a cause of action. So held in *Keltinger v. Forty-Second Street & G. S. F. R. Co.*, 50 N. Y. 206.

Note

Elevated Railroad—Compensation—Injunction.

Where an elevated railroad is constructed in a street without making compensation to an abutting owner he is entitled to an injunction to restrain the erection and continuance of the road. So held in *Story v. New York Elevated R. Co.*, 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596.

Impairment of Incorporeal Rights a Taking.

An owner of property abutting on a city street, although his title extends only to the line of the street and he has no interest therein save an abutter, his incorporeal private rights therein which are incident to his property, and which may be so impaired as to entitle him to damages. Such rights of private property are within the provision of the state constitution forbidding the taking of private property for public use without just compensation, and hence it is no justification for the impairment thereof that the act complained of was done pursuant to legislative authority. So held in *Abendroth v. Manhattan Ry. Co.*, 122 N. Y. 1, 25 N. E. 496, 46 Am. & Eng. R. Cas. 128.

OHIO.

Abutter's Interest in Street—Rule in Ohio.

In *Scioto Valley Ry. Co. v. Lawrence*, 38 Ohio St. 41, it is said in the opinion: "The established doctrine in this state, is that the abutting lot owners have a peculiar interest in the street, which neither the local nor the general public can pretend to claim; a private right of the nature of an incorporeal hereditament, legally attached to their contiguous grounds, and the erections thereon; an incidental title to certain facilities and franchises, assured to them by contracts and by law, and without which their property would be of little value. This easement, appendant to the lots unlike any of one lot owner in the lot of another, is as much property as the lot itself."

Street Railway—Location as Little Injurious as Possible—Abutter Entitled to Compensation.

In *Cincinnati & Spring Grove Avenue St. Ry. Co. v. Cumminsville*, 14 Ohio St. 423, it is held that a finding that injury entitling the owner of abutting property to compensation will result from the laying of a street railroad track, near the sidewalk in front of the owner's house, shop, etc., is in no way qualified or affected by the further fact, also found, that when the interests of the company, and of the traveling public, are also taken into the account, the location would be as little injurious as in any other part of the highway.

Material Injury to Abutting Property—Compensation—Injunction.

In *Scioto Valley Ry. Co. v. Lawrence*, 38 Ohio St. 41, it is held that where the construction of a railroad in a city street will work material injury to the abutting property, such construction may be enjoined, at the suit of the owners, until the right to construct is acquired under proceedings instituted against such owners as required by law for the appropriation of private property. And in such case it is immaterial whether the fee is vested in the city or in the abutting owners, so long as it is held upon the same defined uses.

PENNSYLVANIA.

Mere Obstruction of Portion of Street Occupied by Roadbed.

In *Danville, H. & W. R. Co. v. Commonwealth*, 73 Pa. 29, it is held that a railroad company occupying a portion of a public road not exceeding the extent allowed by law, and obstructing public travel on such portion, is not guilty of nuisance.

RHODE ISLAND.

Diversion of Highway.

Where the charter of a railroad corporation prescribed, that, if the railroad should in the course thereof pass any highway, it should be so constructed as not to impede or obstruct the safe and convenient

Note

use of such highway, and gave the corporation power to raise or lower the highway, so that the road, if necessary, might pass under or over or across the same; and in case they did so raise or lower any highway, gave to the town council of the town, where the highway was located, power to require of the corporation to do it in such manner as should be satisfactory to them, by requesting any alteration or amendment which should be necessary for that purpose. It was held that the corporation were not justified in widening a highway or diverting its course, or supplying its place with a new way so that the railroad would be passed at a point other than its intersection with the original way, even though the change was approved by the town council and was for the convenience of the public, and that, in such case, they were liable to private individuals who had suffered special damages by their act. So held in *Hughes v. Providence & W. R. Co.*, 2 R. I. 493.

WEST VIRGINIA.

In *Guinn v. Ohio River R. Co.* (W. Va.), 13 Am. & Eng. R. Cas., N. S., 437, it is said in the opinion: "It is well settled in this state, though a railroad company has legal authority to build a railroad in a street, yet, if the same work injury to an abutting property owner, he may recover of the company damages therefor. *Stewart v. Railroad Co.*, 38 W. Va. 438, 18 S. E. 604.

Construction in Cut—Not a Taking—Injunction.

Where a railroad company, under statutory authority and with the assent of the municipal authorities, constructs and operates its railroad in a cut below the common level of the remaining portion of the street in such manner as will appropriate a portion of the street to the exclusive use of the railroad, the abutting lot owners on the street so occupied by the railroad, whether they own the fee in the ground covered by the street or not, will not be entitled to enjoin the railroad company from making such excavation and constructing its road along the street in a proper manner, unless the injury therefrom to the lot owner will be such as will entirely destroy the value of his property and therefore be equivalent to a taking of it by the railroad company. So held in *Arbenz v. Wheeling & H. R. Co.*, 33 W. Va. 1, 10 S. E. 14.

In *Spencer v. Railroad Co.*, 23 W. Va. 406, it is said in the opinion: "It is obvious, therefore, that when a railroad company is authorized by the legislature by an express statute, or when authorized by a town council by authority of a legislative statute, which is the same, it cannot either at law or in equity be sued or enjoined, if it is proceeding to build its road in such street carefully and skillfully, and in a manner least injurious to others. And if the constitution gives the owner of an adjoining lot no redress, the injury he sustains, must be regarded as *damnum absque injuria*."

23. Consequential Injuries from Construction and Operation of Railroads on Land Other than Streets.

UNITED STATES.

Elevated Railroad on Private Land—Rights of Owner of Land on Opposite Side of Street.

The construction and operation of an elevated railroad, under the laws of the state, on private land abutting on a public street in a city, gives to the owner of land on the opposite side of the street no claim to recover consequential damages for injury inflicted upon him thereby. So held in *Marchant v. Pennsylvania R. Co.*, 153 U. S. 380, 14 Sup. Ct. Rep. 894.

ARKANSAS.

Railroad companies, acting within the limits of their franchise and using due skill and care in the construction and operation of their roads, and having the right of way are not liable for injuries to out-

Note

side property which are the natural and unavoidable effect of the road. So held in *St. L., I. M. & S. Ry. Co. v. Morris*, 35 Ark. 622, 5 Am. & Eng. R. Cas. 48.

Diversion of Watercourse.

Where a railroad company is authorized by its grant of right of way to divert a watercourse, it cannot be held liable for consequential damages resulting from the change, unless it be unnecessarily or negligently or unskillfully done. So held in *St. L., I. M. & S. Ry. v. Walbrink*, 47 Ark. 330, 26 Am. & Eng. R. Cas. 604.

CONNECTICUT.

Electric Railway Crossing Steam Railroad.

A steam railroad company cannot recover compensation from an electric tramway company for the lawful location of its tracks across those of the former company on such highway, as such impairment of its property is *damnum absque injuria*. So held in *New York, N. H. & H. R. Co. v. Bridgeport Traction Co.*, 65 Conn. 410, 32 Atl. 953.

GEORGIA.

Unusual and Necessary Noises.

In *Gilbert v. Savannah, G. & N. A. R. Co.*, 69 Ga. 396, it is held that if a railroad company, under a grant of right of way, constructs its road with prudence and care, it will not be liable to its grantor for injuries incident to such construction.

Unusual and Unnecessary Noises.

It is only where railroad employees make unusual and unnecessary noises in the running of trains that the company is liable for injuries resulting therefrom. So held in *Morgan v. Central R. Co.*, 77 Ga. 788.

ILLINOIS.

In *Chicago & Western Indiana R. Co. v. Ayers*, 106 Ill. 511, 14 Am. & Eng. R. Cas. 152, it is said in the opinion: "That under this constitutional provision (that 'private property shall' not be taken or damaged for public use without just compensation) a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character; that it does not require that the damage shall be caused by a trespass or actual physical invasion of the owner's real estate, but if the construction of the railroad or other improvement is the cause of the damage, though consequential, the party damaged may recover."

Eminent Domain—Damages—Noise.

In so far as the noise necessarily incident to the proper operation of a railroad over a farm will have a tendency to render the farm less desirable as a place of residence, and therefore less valuable in the market, it is an element of damages which the jury may properly consider in their assessment. So held in *Chicago, P. & St. L. Ry. Co. v. Nix*, 137 Ill. 141, 27 N. E. 81.

Light and Air—Obstruction.

In *Kotz v. Illinois Cent. R. Co.*, 188 Ill. 578, it is held that a railroad right of way is not a public highway in the sense that an adjoining lot owner may have an easement of light, air and view therein, and hence no damages are recoverable for an injury to light, air and view resulting from the elevation of railroad tracks on land which the railroad has the fee.

INDIANA.

The legislature cannot authorize either a direct or consequential injury to property, without compensation to the owner. So held in *Evansville & C. R. Co. v. Dick*, 9 Ind. 433.

Poluting Pond—Dumping Offensive Materials—Remedy.

In *Cleveland, etc., R. Co. v. King*, 23 Ind. App. 573, 55 N. E. 875,

Note

it is held that where the acts complained of in an action for damages to plaintiff's property and the comfortable enjoyment thereof consisted of defendant's casting into a large pond near her premises carloads of dirt and offensive material, causing thereby the water to become foul and poisonous, the nuisance was one which could be abated and plaintiff could not recover for the permanent injury to her property.

IOWA.

Nonabutting Property—Dust and Smoke from Coal Chute—Absence of Negligence.

In *Dunsmore v. Central Iowa Ry. Co.*, 72 Iowa 182, 33 N. W. 456, it is held that a person whose lot does not abut on the right of way of a railroad and whose dwelling is ninety-three feet from a coal chute on the right of way, cannot recover damages of the railway company on account of the annoyances occasioned to him by dust and smoke from the coal chute blowing upon, in, and around his house, and by the noises arising from the operation of the chute, where there is no complaint that the chute is carelessly constructed or improperly operated.

Standing Trains—Noise and Smoke—Consequential Damages.

In *Dunsmore v. Central Iowa Ry. Co.*, 72 Iowa 182, 33 N. W. 456, it is said in the opinion: "The owners of property in the vicinity of a railroad necessarily suffer inconveniences, such as detention of trains upon the track, the noise of passing trains, the smoke emitted from engines, and the like, for which they cannot recover in a suit for damages. *Pierce, Railroads*, 216; *Ror, Railroads*, 457; *Randle v. Pacific Ry. Co.*, 65 Mo. 325; *Parrot v. Railway Co.*, 10 Ohio St. 624; *Cosby v. Railway Co.*, 10 Bush (Ky.), 288; *Struthers v. Railway Co.*, 87 Pa. St. 282."

KENTUCKY.

Smoke—Vibration—Nonabutting Property.

In *Willis v. K. & I. Bridge Co.*, 104 Ky. 186, it is held that an owner of property, although it does not abut on the railroad right of way, or the highway upon which the tracks are laid, may maintain an action for damages against the railroad company for any loss or deterioration in the value of realty caused by the operation of trains, by jarring his walls, blowing smoke and cinders upon his premises, whether the railroad is on land acquired by purchase or condemnation, or in a public street by municipal license.

MICHIGAN.

Incidental Damages to Property Not Taken.

Under the right of eminent domain, where there is no other limitation of the power than such as is contained in a constitutional provision that private property shall not be taken for public use without just compensation, the legislature may provide for a public improvement which may work incidental damages to property without providing for compensation for property not actually taken. So held in *Buhl v. Union Depot Co.*, 98 Mich. 596, 57 N. W. 829.

MINNESOTA.

Injuries Necessarily Caused to Nearby Premises—Noise, Smoke and Vibration.

No action lies against a railroad company for the inconveniences necessarily caused to premises in the vicinity by noises, smoke, jarring of the ground, etc., arising from properly and prudently operating its railroad upon its own lands, or upon land in which the party complaining has no interest. So held in *Carroll v. Wisconsin Cent. R. Co.*, 40 Minn. 168, 41 N. W. 661.

Note

MISSOURI.

Injuries Necessarily Resulting from Construction and Operation—Injunction.

When the owner of land has been paid for a railroad's right of way through it, whether the right of way was obtained by purchase or by condemnation proceedings, the railroad cannot be enjoined from inflicting inconvenience to the grantor or injury to his land, if these be such as necessarily result from a safe and conservative construction and operation of the railroad. So held in *Harrelson v. Kansas City & A. R. Co.*, 151 Mo. 482, 52 S. W. 368.

Bridge—Obstruction of Stream.

Where a railroad company, properly authorized, has constructed a bridge or other structure over a watercourse, it is liable only in case of negligence or unskillfulness in the manner of doing the work, to one suffering injury from its interference with the running water. So held in *Abbott v. Kansas City, St. J. & C. B. Ry. Co.*, 83 Mo. 271, 20 Am. & Eng. R. Cas. 103.

Surface Water—Overflow—Caused by Existence of Roadbed.

A railroad company, in the absence of negligence or unskillfulness in the construction of its roadbed, will not be liable to a land owner for injury from the overflow of surface water occasioned by the existence of the roadbed. So held in *Abbott v. Kansas City St. Joseph & C. B. R. Co.*, 83 Mo. 271, 20 Am. & Eng. R. Cas. 103.

Dam Constructed by County—Overflowing Land.

Where a railroad maintains a dam on its right of way over a watercourse, which constitutes a nuisance, in causing the water to overflow adjoining land, it is liable therefore, although the dam was originally created by the county, under legislative authority. So held in *Payne v. Kansas City, St. J. & C. B. Ry. Co.*, 112 Mo. 6, 20 S. W. 322.

NEW JERSEY.

Use of Highway—Consequential Injuries—Absence of Negligence.

An adjacent land owner cannot maintain an action at law for consequential damages from the proper authorized use of a highway for railroad purposes, unless he can show a negligent exercise by the company of their legal rights, because no action at law will lie for a consequential injury necessarily resulting from the exercise of a legal right under legislative authority. So held in *Morris & E. R. Co. v. City of Newark*, 10 N. J. Eq. 352.

legal right under legislative authority. So held in *Morris & E. R. Co.*

Where a railroad company is authorized to use steam engines upon their road, the company is not responsible for the injury or disturbance resulting from the use of such engines near the road of a turnpike company previously incorporated, unless the right to use such engines is exercised in an extraordinary and unlawful manner not contemplated or warranted by the legislature. So held in *Bordentown & S. Amboy T. P. Co. v. Camden & A. R., etc., Co.*, 17 N. J. L. 314.

Running Trains on Highway—Absence of Negligence or Excessive Use.

An adjacent land owner can maintain an action at law for damages resulting from the running of railroad trains on a public highway only when he can show negligent exercise by the company of its legal rights or a use in excess of such rights, injurious to such owner. So held in *Thompson v. Pennsylvania R. Co.*, 51 N. J. L. 42, 15 Atl. 833.

Making up Trains—Injuries to Dwellings—Absence of Negligence or Abuse of Franchise.

In *Beideman v. Atlantic City R. Co.* (N. J. Ch.), 19 Atl. 731, it is held that a railroad company will not be enjoined in the use of its main tracks in the making up of its outgoing trains and in unmaking its incoming trains, in doing which loud noises

Note

are made by means of the cars, engines, and men, and smoke and steam cast off, and the dwellings of the complainant caused to tremble or vibrate, and when the doors or windows are open, smoke and steam carried therein, so that the inmates are aroused from their sleep, and his wife afflicted with nervousness, unless it be shown that there is some abuse or negligence in the use of the franchise.

Standing Cars—Malodorous Freight—Noises—Vibration—Incidental Injuries—Absence of Negligence or Want of Skill.

In *Beseman v. Pennsylvania R. Co.* (N. J.), 21 Vroom 235, it was held that an action would not lie against a railroad company authorized by its charter to construct and operate a railroad, at the suit of the owner of lands adjacent to the company's track, to recover damages arising incidentally from the operating of its railroad and the transaction of its business, except upon an allegation of negligence or want of skill. In that case the suit was by the owner of improved property adjacent to the track of the company's railroad. The declaration alleged that the company built an elevated track for a railroad in the rear of the plaintiff's lots, within ten feet of the dwelling houses thereon and used said track for the passage of locomotives and cars in the transportation of live stock, manure, and other freight so as to render such dwellings unfit for habitation, and allowed its cars loaded with such freight, both in the daytime and at all hours of the night, to stand upon such track, emitting noisome odors, etc., distributed its cars, and blew the whistles of its locomotives, causing great and unusual noises, etc., and jarring the doors and walls of such dwellings, etc. To this defendant pleaded its chartered right to build an elevated railroad, and that it used the same in the prosecution of its business as a common carrier of passengers and freight, as it lawfully might do, and did thereby necessarily create some smell and some noise, and did necessarily shift and distribute its cars, and did necessarily blow the whistles of its locomotives, etc., and did necessarily cause noises, smoke and vibrations, and did necessarily transport thereon live stock, manure and other freight, as it lawfully might do. The court in sustaining this plea, placed its opinion on the ground that defendant's franchises legalized the running of trains and transportation of freight by the company, and the acts complained of being of themselves lawful, those incidental injuries which necessarily and unavoidably resulted from the exercise of legislative authority, if prosecuted with due care, were *damnum absque injuria*, for which no action would lie.

No action can be maintained for injuries resulting to individuals from acts done by persons in the execution of a public benefit, acting with due skill and caution, and within the scope of their authority. But this principle does not apply to a private corporation authorized by the legislature to construct works of public improvement, by private capital for private profit. So held in *Tinsman v. Belvidere Delaware R. Co.*, 2 Dutch. (N. J.), 148.

Convenient Transaction of Lawful Business—House Rendered Unfit for Residence.

A railroad company cannot justify the maintenance of a condition of things which directly renders a dwelling house in the neighborhood unfit for a place of residence upon the ground that the nuisance necessarily results from the convenient transaction of the company's lawful business, and such a nuisance will be prohibited by injunction. So held in *Pennsylvania R. R. Co. v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432, 26 Am. & Eng. R. Cas. 559.

Embankment—Dwellings Injured by Pressure.

In *Costigan v. Pennsylvania R. Co.*, 54 N. J. L. 233, 23 Atl. 810, it was claimed that the defendant, wrongfully and injuriously intending, etc., filled in upon its lands a great quantity of earth, etc., and raised thereon an embankment of great height, and thereby forced and pressed a large quantity of such earth, etc., into and upon plaintiff's

Note

lot, beneath the surface of the same and caused the foundation and walls of the dwelling houses thereon to crack and topple over. It was held that a plea setting up the charter of the defendant, authorizing it to construct and operate a railroad, was no justification for the injury complained of, although it was averred in the plea that the company constructed its railroad upon its own lands, with reasonable care and prudence, doing no unnecessary damage to the property of others.

NEW YORK.

A railroad company cannot be held liable for the unavoidable or usual consequence to adjacent property of the proper operation of its road. So held in *Flinn v. New York Cent. & H. R. Co.*, 142 N. Y. 11, 36 N. E. 1046.

Restoration of Highway—Railroad as a Public Authority.

When a railway company, under statutory authority, enters upon the restoration of a highway, it becomes for the time and at the place the constituted public authority to make the restoration, and if it does so with reasonable care and skill, it encounters no greater liabilities than would attend the same work if made by the usual public authority. So held in *Conklin v. New York, O. & W. Ry. Co.*, 102 N. Y. 107, 6 N. E. 663.

Injuries Necessarily Resulting from Construction and Operation.

In *Uline v. New York C. & H. R. R. Co.*, 101 N. Y. 98, 4 N. E. 536, it is held that where a railroad is built, with proper care and skill, after public rights and private property, if any, in the highway, or the soil thereof, have been acquired, it is not a nuisance, and the railroad company is not responsible for any damages to private property, adjacent or near to the road, necessarily resulting from its construction or operation.

Exercise of Powers—Private Rights.

In *Booth v. Rome, W. & O. T. R. Co.*, 140 N. Y. 267, 35 N. E. 592, it is held that the powers granted to railroad corporations are to be constructed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights and under the same responsibility as though the acts in execution of such powers were done by an individual.

NORTH CAROLINA.

Diversion of Surface Water—Overflowing Land—Careful Construction of Necessary Ditch.

In *Staton v. Norfolk & Carolina R. Co.*, 111 N. Car. 278, 16 S. E. 181, 52 Am. & Eng. R. Cas. 686, it is held that where a railroad company, by the careful construction of a necessary ditch along its right of way, diverts surface water so as to cause the overflow of land of an owner on the natural stream into which the water would have naturally flowed, the company is liable for the damages caused thereby.

Consequential Damages.

In *Staton v. Norfolk & Carolina R. Co.*, 111 N. Car. 278, 16 S. E. 181, 52 Am. & Eng. R. Cas. 686, it is said in the opinion: "As we understand it, the exceptions most seriously relied upon are addressed to the refusal of the court to give the instructions prayed for; and they substantially involve the proposition that, inasmuch as the legislature has authorized the defendant to construct its road, it is not liable to an adjacent proprietor for any damages incident to such construction, provided the work is necessary and is skillfully and carefully performed. In other words, it is insisted (notwithstanding our declaration to the contrary in *Jenkins' Case*), that a railroad company, under such circumstances, is entitled to greater privileges than an individual and that where the latter would be liable for a violation of the principles embodied in the maxim, *sic utere tuo ut alium non laedas*."

Note

non laedas, the former would be exempt from all responsibility whatever; and this upon the theory that the damage is supposed to be 'consequential,' for which no action can be maintained. In support of this view, it is asserted that a railroad is for the benefit of the public, and that, in the very authority to construct it, there is an implied subordination by the legislature of the right individuals. This may all be true when compensation is provided, as where land is actually condemned and taken as a right of way, but it would be a strange measure of justice to require a railroad company to pay only for a narrow strip of land about 50 or 100 feet in width, and at the same time practically confer upon it the privilege of destroying thousands of acres of land of adjacent proprietors, without either the duty of making compensation or the liability to a common-law action for damages. It would be of small comfort to the ruined proprietor to be told that he must bear his loss for the benefit of the public, and it would not be unnatural if he answered that if the public good required the destruction of his property an enlightened sense of public justice should demand that he be compensated for his loss. In this he would be sustained by the words of Sir William Blackstone, that the public good is in nothing more essentially interested than in the protection of every individual's private rights. Bl. C. Comm. 138."

PENNSYLVANIA.

Consequential Injuries—Common Law.

A common-law action does not lie against a railroad for consequential injuries occasioned by the construction and operation of its road. So held in *Struthers v. Dunkirk, W. & P. Ry. Co.*, 87 Pa. St. 282.

A railroad company is not liable for consequential damages from the location and construction of their road unless made so expressly by statute. So held in *New York & Erie R. Co. v. Young*, 33 Pa. St. 175.

TEXAS.

Land Not Taken—Damages Recoverable—Constitutional Provision.

Under a constitutional provision that "no person's property shall be taken, damaged, or destroyed for or applied to a public use without adequate compensation being made, unless by consent of such person." A land owner, whose property is injured by the construction of a railway and running trains thereon, is entitled to damages, although the railway be not upon his land nor any of his property be taken. So held in *Gainesville, H. & W. Ry. Co. v. Hall*, 78 Tex. 169, 14 S. W. 259.

Coal Hoist Near Residence—Annoyance and Discomfort.

In *Daniel v. Fort Worth & Rio Grande Ry. Co.*, 96 Tex. 327, it is held that the damages recoverable for the creation of a nuisance near plaintiff's residence from the construction of a coal hoist and the supplying locomotive engines are not limited to depreciation in the market value of his property, but may include, along with such depreciation, compensation for the personal annoyance and discomfort suffered by plaintiff and his wife in the use of their home.

Construction of Dam—Unwholesome Gases.

In *Ft. Worth & D. C. R. Co. v. Scott*, 2 Tex. Civ. App. 137, it is held that if a railroad company contributes essentially to the creation of a nuisance, as by the creation of a dam which renders water stagnant, or produce its overflow so as to cause it to gather in pools and become stagnant, or by raising it so as to cause the decay of vegetable matter, whereby unwholesome gases are developed, the company is liable, although natural causes combine to produce the result.

VERMONT.

Consequential Damages—Absence of Legislative Requirement.

In *Hatch v. Vermont Cent. R. Co.*, 28 Vt. 142, it is said in the opin-

Note

ion: "It has been settled, even by our courts, that it is competent for the legislature to grant the right of building a railroad without requiring compensation to be made to land owners for consequential damages in cases in which no land has actually been taken for the use of the road; and, as the legislature have not required compensation to be made in a case like this, for consequential damages, the plaintiff must be without redress so long as the company keeps within their powers and are not guilty of negligence or a want of care in the exercise of their powers under their charter."

Not Made Liable for Consequential Damages—Land Not Taken—Powers Not Exceeded and Absence of Negligence.

In an action against a railroad company, which is not made liable for consequential damages, occasioned by the construction of their road, to persons whose lands are not taken, evidence as to the manner in which they have constructed their road upon premises not belonging to the plaintiff, is inadmissible, if it does not tend to show that the company has exceeded its powers or has been negligent in the exercise of them. So held in *Hatch v. Central R. Co.*, 28 Vt. 142.

Diversion of Watercourse—Subsequent Encroachment.

Where a railroad has rightfully and properly diverted a watercourse, the company is not obliged thereafter to observe the action of the water and so protect the banks, or take other measures, so as to prevent the encroachment of it upon other lands. So held in *Norris v. Vermont Cent. R. Co.*, 28 Vt. 99.

Diversion of Stream—Necessary Railroad Structures—Negligence—Gradual Washing Away of Land.

In *Henry v. Vt. Cent. R. Co.*, 30 Vt. 638, it is held that a riparian proprietor, whose land has gradually washed away by a change in the course of the current of the stream occasioned by necessary erections, made above him in the stream by a railroad company, has no claim for damages against the company whether such erections have been made in a careless or unskillful manner or not, as the injury is one of those remote consequences of which the law takes no such account as to make it the basis of an action.

Ingress and Egress—Embankment—Damages—Absence of Legislative Requirement.

In *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465, it appeared that a railroad company, in constructing its road, raised a high embankment near to, and in front of, the plaintiff's house, so as to prevent ingress and egress to and from the same. It was held that as the charter of the defendants only required them to make compensation for lands, which were taken for railroad purposes, they would not be liable for such consequential damages; and that simply the affecting of lands injuriously, by the construction of their railroad, was not a taking of it for public use, within the meaning of the constitution; therefore the company was fully justified, under its charter, in building their railroad in a prudent and reasonable manner, and could not be subjected to damages resulting to individuals, whose lands had not been taken by them.

Consequential Damages—Additional Compensation—Legislative Requirements.

In *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465, it is said in the opinion: "In no case where the legislature have authorized a railroad company to construct their road on or across a public highway, without making further compensation to the owners of the fee in the highway, have they, that I am aware of, required additional compensation to be made to the adjoining land owners, unless such easements may be brought within the general provision for assessing damages, where lands have been taken for the purposes of a railroad, of which I have much doubt."

Lateral Support.

In *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465, it is held that

Note

where a corporation, in constructing its railroad, made an excavation upon their own lands, but so near the line of the plaintiff's land adjoining, that the soil of plaintiff's, without any artificial weight being placed thereon, slid into the excavation, it was held that the company was liable for the injury.

WISCONSIN.

Stockyard—Statute Requiring Freight to Be Received and Carried Promptly—Proper Location and Absence of Negligence.

Under Wis. Rev. St. 1898, 1899, requiring every railroad company to receive and carry freight tendered for shipment, and to provide suitable facilities for receiving the same, at any of its stations, and sections 1801, 1799a, requiring such company to maintain a station at every village through which the road passes, and to receive for carriage all live stock offered from Feb. 1st to Sept. 30th, and promptly transport the same, the maintenance of stockyards near railroad stations is necessary, and no recovery can be had against a railroad company on the ground that such a stockyard is a nuisance, without showing that the location of the yard was not a reasonably proper one, or that the company did not use reasonable diligence in preventing unhealthy conditions and unpleasant noises therein. So held in *Dolan v. Chicago, M. & St. P. Ry. Co. (Wis.)*, 8 R. R. R. 133, 31 Am. & Eng. R. Cas., N. S. 133.

Stockyards—Only Practicable Location.

In *Dolan v. Chicago, M. & St. P. Ry. Co. (Wis.)*, 8 R. R. R. 133, 31 Am. & Eng. R. Cas., N. S. 133, 95 N. W. 385, it is held that on an issue as to whether railroad stockyards are a nuisance, evidence that there is no other reasonably convenient and practicable location for the yards is admissible.

24. Unauthorized Construction and Operation of Railroad.**a. General Rule.**

The unauthorized construction and operation of a railroad is a nuisance entitling the owner of property sustaining special injuries therefrom to damages or injunctive relief. *Pittsburgh, etc., Ry. Co. v. Hood (C. C. A.)*, 15 Am. & Eng. R. Cas., N. S., 648; *Borough of Stamford v. Stamford Horse Ry. Co.*, 56 Conn. 381, 15 Atl. 749; *Koehl v. Schoenhausen*, 47 La. Ann. 1316, 17 So. 809; *Wellcome v. Inhabitants of Leeds*, 51 Me. 313; *Thayer v. Boston*, 19 Pick. (Mass.), 514; *Commonwealth v. Old Colony & Fall River R. Co.*, 14 Gray (Mass.), 93; *Thompson v. Pennsylvania R. Co. (N. J. Ch.)*, 14 Atl. 897; *Babbage v. Powers*, 130 N. Y. 281, 29 N. E. 132; *Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307; *Beekman v. Third Avenue R. Co.*, 153 N. Y. 144, 47 N. E. 277; *Bellinger v. New York Cent. R. Co.*, 23 N. Y. 42; *Railroad v. Naylor*, 2 Ohio St. 235; *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339; *Thomas v. Inter-County St. R. Co. (Pa.)*, 31 Atl. 476; *State v. Troy & Boston R. R. Co.*, 57 Vt. 144; *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181; *Daly v. Milwaukee Elec. Ry. & Light Co. (Wis.)*, 9 R. R. R. 520, 32 Am. & Eng. R. Cas., N. S., 520, 96 N. W. 832; *Evans v. C., St. P. M. & O. R. Co.*, 86 Wis. 597, 57 N. W. 354; *Linden Land Co. v. Mil. El. Ry. & L. Co.*, 107 Wis. 493, 83 N. W. 851; *Zettel v. City of West Bend*, 79 Wis. 316, 48 N. W. 379.

A railroad laid out over and along a highway in such a manner as to obstruct it, without express statutory authority, or authority by necessary implication, is liable to indictment as guilty of a nuisance. So held in *Com. v. Old Colony & Fall River R. Co.*, 14 Gray (Mass.), 93.

The construction and maintenance of a street railway without legislative authority is a public nuisance, and subjects the railway company to a private action in favor of any person sustaining special injury therefrom. So held in *Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307.

Note

b. Illustrations.**(1) Operation of Freight Cars on Street Railway Track without Authority—Injuries to Pedestrian.**

In *Daly v. Milwaukee Elec. Ry. & Light Co. (Wis.)*, 9 R. R. R. 520, 32 Am. & Eng. R. Cas., N. S., 520, 96 N. W. 832, it is held that where a street railway company operated freight cars over its tracks without authority and in violation of law, the operation of such cars constituted a nuisance, for which a pedestrian injured thereby was entitled to recover without regard to the care exercised in operating the cars.

(2) Unauthorized Uses Made of Licenses.

State and municipal licenses furnish no defense against a suit to abate nuisances arising from the unauthorized uses made of the licenses. So held in *Koehl v. Schoenhausen*, 47 La. Ann. 1316, 17 So. 809.

(3) Grant—Restriction for Benefit of Portion Retained—Elevated Railway—Injunction.

Where a grantor, retaining a portion of the land out of which the grant is made, enters into an express written understanding with his grantee which restricts the enjoyment of the portion of land conveyed in order to benefit the portion retained, and the restriction is reasonable and consonant to public policy, if the restriction extends to the use of it by an elevated railway although it be operated with care and skill, the owner of the land, for the benefit of which the agreement was had, may cause the inhibited use to be restrained by injunction. So held in *Hayes v. Waverly & P. R. Co.*, 51 N. J. Eq. 345, 27 Atl. 648.

(4) Diversion of Stream—Work of Public Utility—Liability.

One who, without legislative authority, interferes with the current of a running stream, is responsible, absolutely and without regard to actual negligence, for the damages sustained in consequence of his interposition by those who are entitled to have the water flow in its natural channel. Where, however, such interference is in pursuance of legislative authority, granted for the purpose of constructing a work of public utility, upon making compensation the party obstructing the stream is liable only for such injury as results from the want of due skill and care in so arranging the necessary works as to avoid any danger reasonably to be anticipated from the habits of the stream and its liability to floods. So held in *Bellinger v. New York Cent. R. Co.*, 23 N. Y. 42.

(5) Railroad in Street.

The construction and use by a railroad company of its road longitudinally on a street, without legislative authority, not only creates a public nuisance, but constitutes the railroad company a trespasser, and renders it liable for such damages as proximately result from such occupation or use to persons or property. So held in *Pittsburg, etc., Ry. Co. v. Hood (C. C. A.)*, 15 Am. & Eng. R. Cas., N. S., 648.

(6) Relocation of Road.

In *Railroad v. Naylor*, 2 Ohio St. 235, the facts were that the charter of a railroad company merely fixed a few points from its commencement to its terminus, leaving the exact location of the road to the discretion of the company. After the road had been once located, the company undertook to relocate and to change and rebuild the road, and in doing so rendered the premises of the plaintiff less valuable than they had been before. It was held by the supreme court that, the company having once located their road, their power in that respect ceased, that the relocation was unauthorized, and that the company was, therefore, liable for any damages done to property in the relocation of the road.

(7) Railroads—Unauthorized Location.

When a railroad authorized to be made at one place is made at another, it is a mere nuisance on every highway it touches in its illegal

Note

course. So held in *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339.

(8) Railroad in Street—Others Injured.

A street railway company attempting to construct its road in a public street without authority is a trespasser committing a nuisance, which an abutting owner may abate, notwithstanding the other abutters suffer in the same manner as he does. So held in *Thomas v. Inter-County St. R. Co.* (Pa.), 31 Atl. Rep. 476.

But a street railway is not liable for the annoyance to an abutting owner arising from the maintenance of the cross-over switch, which annoyance is incident to the use of the street for public travel, merely, because the company, in disobedience of the orders of the city council, built its cross-over switch in front of such owner's property. So held in *State ex rel. Howard v. Hartford St. Ry. Co.* (Conn.), 11 R. R. 838, 34 Am. & Eng. R. Cas., N. S., 838, 56 Atl. 506.

(9) Bridge over Navigable River—Construction—Departure from Terms of Federal Statute.

If in the construction of a bridge over a navigable river, a departure be made from the terms of an act of congress authorizing it, the bridge will, to that extent, be an unlawful structure, and the owners liable for any damage which it may cause or help to cause to any vessel navigating the river in charge of a pilot exercising usual and ordinary care and skill. So held in *Missouri River Packet Co. v. Hannibal & St. Joseph R. R. Co.*, 79 Mo. 478, 20 Am. & Eng. R. Cas. 275.

(10) Canal—Unauthorized Mode of Construction.

A canal authorized by law, but not constructed in accordance with statutory provisions, may constitute a nuisance, entitling an owner of adjacent property to enjoin it, and to damages. So held in *Davis v. City of Sacramento*, 59 Cal. 596.

(11) Cross-Over Switch—Location—Approved Plan Not Followed.

In *State v. Hartford St. Ry. Co.* (Conn.), 11 R. R. 838, 34 Am. & Eng. R. Cas., N. S., 838, it is held that a street railroad authorized by the legislature, and approved, in its location and mode of construction, by the city council, and built in substantial accord with that approval, is not a public nuisance merely because it does not follow the approved plan as to the location of a cross-over switch.

25. Whether Damages from Construction and Operation of Railroad Were Included in Condemnation Assessment or in Consideration.

In some cases this question is an important one when it is necessary to determine whether a railroad company, after it has lawfully acquired by grant or condemnation, and paid for its right of way, is liable to an abutting or adjacent owner for injuries resulting from the construction or operation of its road.

a. Damages Included.

It may be stated as a general rule, that the railroad company, after it has lawfully acquired and paid for its right of way, is not liable on account of injuries to abutting or neighboring property which necessarily result from the nonnegligent and skillful construction and operation of its road, as they were expressly or impliedly included in the amount paid by it for the right of way.

UNITED STATES.—*Porterfield v. Bond* (C. C. A.), 38 Fed. 391.

ILLINOIS.—*Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460; *Kotz v. Illinois Cent. R. Co.*, 188 Ill. 578; *Tinker v. City of Rockford*, 137 Ill. 123, 27 N. E. 74; *Illinois Cent. R. R. Co. v. Anderson*, 78 Ill. App. 621.

INDIANA.—*Terre Haute & Ind. R. Co. v. McKinley*, 33 Ind. 274.

MARYLAND.—*Hodges v. Baltimore Union Pass. Ry. Co.*, 58 Md. 603, 10 Am. & Eng. R. Cas. 270.

MINNESOTA.—*Jungblum v. Minneapolis N. U. & S. W. R. Co.*, 70 Minn. 153, 72 N. W. 971.

Note

MISSOURI.—McCormick *v.* Kansas City, etc., R. Co., 57 Mo. 433.
NEBRASKA.—Moseley *v.* Chicago, B. & Q. R. Co., 57 Neb. 636,
78 N. W. 293.

NEW HAMPSHIRE.—Johnson *v.* Atlantic & St. L. R. Co., 35 N.
H. 569.

NORTH CAROLINA.—Fleming *v.* Wilmington & W. R. Co., 115
N. Car. 676, 20 S. E. 714; Adams *v.* Durham & N. R. Co., 110 N. Car.
325, 14 S. E. 857.

PENNSYLVANIA.—Pittsburg Ft. W. & C. Ry. *v.* Gilleland, 56
Pa. 445.

VERMONT.—Norris *v.* Vermont Cent. R. Co., 28 Vt. 99.

WEST VIRGINIA.—Smith *v.* Point Pleasant & Ohio River R. Co.,
23 W. Va. 451, 20 Am. & Eng. R. Cas. 160; Watts *v.* Norfolk & W. R.
Co., 39 W. Va. 196, 19 S. E. 521.

The just compensation to be made for damage to land is intended as an indemnity, not for successive, constantly accruing damages as they may afterwards be suffered, but for all the land owner may suffer from all the future consequences of the careful and prudent operation of the proposed public structure or other improvement. So held in Chicago & E. I. R. Co. *v.* Loeb, 118 Ill. 203, 8 N. E. 460.

(1) **Elevation of Track—Increased Noise, Smoke and Cinders—Injury to Owner of Subsequently Purchased Lot.**

In Kotz *v.* Illinois Cent. R. Co., 188 Ill. 578, it is held that damages from increased noise, smoke, cinders, etc., due to track elevation and consequent changes in operating a railroad, is *damnum absque injuria*, as to the owner of an adjoining lot purchased after the recordation of the deed granting the railroad company a right of way for all purposes connected with the complete operation of the railroad.

(2) **Grant of Land for Right of Way—Smoke, Cinders and Vibration—Injury to Other Portion of Lot.**

Where land is conveyed "for the purpose of constructing a railroad, and for all purposes connected with the construction and use of said railroad, it was held that as the casting of smoke, cinders, ashes, sparks, and the shaking of the soil, upon other parts of the lot was a necessary incident operation of the railroad the right to do such acts was necessarily implied from the grant. Chicago, Rock Island & P. Ry. Co. *v.* Smith, 111 Ill. 363, 29 Am. & Eng. R. Cas. 558.

(3) **Grant of Right of Way—Injuries from Lawful Construction and Operation—Damages Included in Consideration.**

A deed of land to a railroad company, for the location of right of way and tracks, will be a license to the company to do what is lawful in the construction and management of its road, to the same extent and with like effect as if the land had been acquired by condemnation, and any damages resulting to the full enjoyment of all that was intended by the grant will be presumed to have been compensated by the consideration paid for the property. So held in Tinker *v.* City of Rockford, 137 Ill. 123, 27 N. E. 74.

(4) **Switches and Turntables—Smoke—Necessary Incidents.**

In Illinois Cent. R. Co. *v.* Anderson, 78 Ill. App. 621, it is held that where a grant of a right of way to a railroad company is for a specific purpose, as for all lawful uses and purposes incident to a full and indefeasible title in fee simple, or in any way connected with the construction, occupation, sole enjoyment, maintenance, repair and complete operation of a railroad, construction of switches and turntables; the turning, moving and standing thereon of engines; the casting of smoke, and cinders upon the abutting premises, are necessary incidents of a complete operation of the road. The grant being for such purposes, the consideration must be considered as full compensation in law for all present and future damages.

(5) **Horse Railway—Contemplated Use.**

In Hodges *v.* Baltimore Union Pass. Ry. Co., 58 Md. 603, 10 Am. & Eng. R. Cas. 270, it is held that the right to use the streets of a

Note

city for a horse railway, rests on the ground that such a use is neither inconsistent with, nor does it in any manner supersede, the ordinary uses for which the street was dedicated for a highway; that the easement thereby acquired was the right to use the streets not only according to the then existing modes of travel and transportation but all such other modes as might arise in the ordinary course of improvement; and that a horse railway is but one of the legitimate contingencies within the object and purpose for which the street was dedicated to the public, and which, it is therefore, to be presumed, was within the contemplation of the parties at the time damages were assessed to abutting owners.

(6) Grant of Right of Way—Damages Included in Consideration—Nonnegligent Construction and Operation.

The agreed consideration for the grant of a right of way is conclusively presumed to include the value of the land conveyed and all damages to the grantor's adjacent lands resulting from the nonnegligent construction and operation of the road. So held in *Moseley v. Chicago, B. & Q. R. Co.*, 57 Neb. 636, 78 N. W. 293.

(7) Proper Construction—Damages Included in Award.

In *Johnson v. Atlantic & St. Lawrence R. Co.*, 35 N. H. 569, it is said in the opinion: "For any loss or injury which results from building the road in a suitable and proper manner, the land owner can maintain no action against the company. The damages awarded must be regarded as a full compensation for all the injury which the land owner may sustain, then or at any future time, from any cause which the commissioners were bound or had a right to consider. It must be taken that they have done their duty in considering all such cases of damage as were legitimate subjects for their consideration."

(8) Excavation—Disappearance of Spring.

In *Aldrich v. Cheshire R. Co.*, 21 N. H. 359, it appeared that plaintiff's buildings were supplied with water from a permanent spring; that after an excavation had been made in his land for the purposes of the railroad water appeared in the excavation about fifteen feet below the surface of the ground, and the spring disappeared; and that damages had been assessed to him before the excavation was made. It was held that the injury to the spring must be presumed to have been considered by the commissioners, and that an action to recover damages therefore could not be sustained.

(9) Bridge—Incident to Grant.

The damage due to the erection of a waterway over a running stream at the point of its intersection with a railroad is considered when the work is skillfully done, to be included in the cost and valuation of the easement, or to have passed as incident to the grant of it, and when it is admitted that it was so constructed, neither the owner of the land nor the proprietor of the tract above can maintain an action for damages caused by placing the structure across the stream. So held in *Fleming v. Wilmington & W. R. Co.*, 115 N. Car. 676, 20 S. E. 714.

(10) Watercourse—Unnecessary Diversion—Trespass—Damages Included in Assessment.

Although the diversion of a natural stream from its channel by a railroad company is a trespass when it is not necessary to the skillful construction of the road to change its course, yet the authority to divert surface water accumulating at a proper embankment, the building of which was necessarily contemplated by those who assessed or agreed upon the value of the right of way, and to carry it in side ditches, constructed on the right of way, to its natural outlet or to some natural outlet adequate to receive it, is included in the easement, and damages therefrom covered by the estimate of such cost. So held in *Fleming v. Wilmington & W. R. Co.*, 115 N. Car. 676, 20 S. E. 714.

Note

(11) Grant of Right of Way—Contingent Damages Included in Consideration.

Where land is deeded to a railroad company, it is to be presumed that the contingent damages which would have been included in an assessment of the damages by commissioners, upon a compulsory taking of it, were considered in determining the price which was paid for it. So held in *Norris v. Vermont Cent. R. Co.*, 28 Vt. 99.

In *Smith v. Point Pleasant & Ohio River R. Co.*, 23 W. Va. 451, 20 Am. & Eng. R. Cas. 160, it is held that when a railroad company, duly authorized, is building its road through a town, subsequent to a suit by an abutting lot owner, in which his entire damages were recovered, no second suit can be brought, except to recover damages which did not necessarily result from the building and proper use of its track by the railroad company in such street; and that a second suit could only be brought for the careless running of cars in the street or for other wrongs done by the company, not including the injury necessarily resulting from the running of its cars in such street, which is the right of the company.

In *Smith v. Point Pleasant & Ohio River R. Co.*, 23 W. Va. 451, 20 Am. & Eng. R. Cas. 160, it is said in the opinion: "The simple running of their cars through said street in a careful and proper manner, though it might be a nuisance and a loss to the plaintiff, would be no wrong to him, as they would have a right to do so and would have in the contemplation of the law compensated the plaintiff therefor when they paid the judgment recovered in the first suit."

(12) Injury to Private Ferry—All Damages Included in Assessment.

In *Watts v. Norfolk & W. R. Co.*, 39 W. Va. 196, 19 S. E. 521, it is held that when one grants to a railroad company a strip of land for use in the construction of its road, all damages to the residue of the track arising from the construction, which can be taken into consideration in the assessment of compensation under condemnation proceedings are released, and the grantor cannot recover for injury to a private ferry from obstruction of one of its approaches by the proper construction of the railroad.

b. Damages Not Included.

But damages to such property arising from negligence or lack of skill, either in the construction or operation of the road, are not by implication included in the damages assessed in the proceeding in which the right of way was condemned nor, in case of a grant of right of way, in the consideration agreed upon.

UNITED STATES.—*Porterfield v. Bond (C. C.)*, 38 Fed. 391.

ILLINOIS.—*Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460.

INDIANA.—*Terre Haute & Ind. R. Co. v. McKinley*, 33 Ind. 274.

IOWA.—*King v. Iowa Midland R. R. Co.*, 34 Iowa 458.

MINNESOTA.—*Jungblum v. Minneapolis, N. W. & S. W. R. Co.*, 70 Minn. 153, 72 N. W. 971.

MISSOURI.—*McCormick v. Kansas City, etc., R. Co.*, 57 Mo. 433.

NEBRASKA.—*Moseley v. Chicago, B. & Q. R. Co.*, 57 Neb. 637, 78 N. W. 293.

NEW HAMPSHIRE.—*Aldrich v. Cheshire R. Co.*, 21 N. H. 359.

NORTH CAROLINA.—*Fleming v. Wilmington & W. R. Co.*, 115 N. Car. 676, 20 S. E. 714; *Parker v. Norfolk & C. R. Co.*, 119 N. Car. 677, 25 S. E. 722; *Adams v. Durham & N. R. Co.*, 110 N. Car. 325, 14 S. E. 857.

PENNSYLVANIA.—*Edmundson v. Pittsburg, M. & Y. R. Co.*, 111 Pa. St. 316, 2 Atl. 404, 23 Am. & Eng. R. Cas. 423; *Pittsburgh, Ft. W. & C. Ry. v. Gilleland*, 56 Pa. 445.

TENNESSEE.—*Carriger v. East Tenn. Va. & Ga. R. Co.*, 76 Tenn. 388.

Note

(1) Unlawful Use of Right of Way—Damages Not Included in Original Assessment.

Where damages are assessed in an ad quod damnum proceedings for a railroad right of way, only such damages as will naturally and reasonably flow from a lawful use of the right of way can be taken into account by the commissioners called to make the assessment; and if, after the assessment is made, and the company takes possession, they make an unlawful use of the right of way, and damages flow therefrom, the owner is entitled to additional damages, such additional damages not having been included in the original assessment. So held in *Porterfield v. Bond* (C. C.), 38 Fed. 391.

(2) Damages Included in Statutory Compensation—Unnecessary Injuries.

The statutory damages to be assessed and paid to a land owner whose land is taken for the use of a railroad, are those resulting from a construction of the road with care, skill and prudence, not only as to the safety of persons and property passing over the road, but also as to the protection and safety of the property holder; and that if by reason of any want of care, skill, or prudence for the protection and safety of the land owner, his property was unnecessarily damaged in the construction or repairing of the road, he might recover therefor in an action for damages at common law. So held in *Terre Haute & Ind. R. Co. v. McKinley*, 33 Ind. 274.

In *King v. Iowa Midland R. R. Co.*, 34 Iowa 458, in a proceeding to appropriate land for the right of way of a railroad already constructed, evidence of damages resulting from defective construction, or the like, is not admissible; that while such damages may furnish cause of action to recover the same in an action therefore, they are not to be considered in assessing the compensation to be allowed the owner for the right of way appropriated; and that, for the same reason, neither could the failure of the company for a time to erect cattle guards, and thus in a manner to throw plaintiff's farm open as a common, be considered in estimating damages in such a proceeding.

(3) Right of Way Acquired by Deed—Damages—Scope of Exemption—Negligence in Construction.

A railroad company acquired its right of way over plaintiff's land by deed which in terms released the defendant from all damages by reason of the location, grade, construction, maintenance and operation of a railway over and upon the premises conveyed. It was held that the deed only released the company from all damages resulting from a reasonable and nonnegligent construction of a railway over and upon the premises conveyed. So held in *Jungblum v. Minneapolis, N. & S. W. R. Co.*, 70 Minn. 153, 72 N. W. 971.

(4) Railroad—Incidental Damages Included in Assessment—Presumption—Negligence.

In *McCormick v. Kansas City, etc., R. Co.*, 57 Mo. 433, it is held that damages to adjoining land such as would naturally occur where a railroad is constructed and used in a lawful and ordinary manner, are presumed to be included in the estimate of damages assessed in condemning the roadbed, and cannot afterwards be recovered in a suit against the railroad. But otherwise where the injuries are the result of tort or negligence on the part of the company.

(5) Construction of Waterway—Damages Included in Compensation—Unnecessary Injuries.

It is the general rule that damages to land caused by the erection of a waterway by a railroad company, if skillfully constructed, are included in the compensation for and pass by the easement of the right of way; but this general rule is subject to another rule that the grantee of the easement shall not use its privilege in such manner as to inflict unnecessary injury upon the servient estate. So held in *Adams v. Durham & N. R. Co.*, 110 N. Car. 325, 14 S. E. 857.

Note

(6) Diversion of Surface Water—Incident to Grant.

Although authority to divert surface water to its natural outlet, or an outlet capable of receiving it, is included in the easement acquired by a railroad company in the grant or condemnation of a right of way, the company is nevertheless subject to the same restrictions as any other land owner in carrying it off, and is liable for damages to private property from negligence in doing the work. So held in *Parker v. Norfolk & C. R. Co.*, 119 N. Car. 677, 25 S. E. 722.

(7) Damages Included in Award or Release—Negligent Construction.

Damages resulting from negligence in constructing a railroad are not included in an award in condemnation proceeding or by implication in a release of damages in a grant of a railroad right of way. So held in *Edmundson v. Pittsburgh, M. & Y. R. Co.*, 111 Pa. St. 316, 2 Atl. 404.

(8) Injury from Unskillful Construction.

In assessing damages against a railroad company, all such natural and probable consequences of the work in producing injury as would fairly arise to the mind of an intelligent viewer must be allowed for; but an injury arising from unskillful construction of the company must be left for future remedy. So held in *Pittsburg, Ft. W. & C. Ry. v. Gilleland*, 56 Pa. 445.

(9) Statutory Compensation—Injuries from Negligence and Trespass Not Included—Surface Water.

Possible future injuries from accumulated surface water, caused by the erection of the roadbed and track of a railroad, was not a part of the incidental loss and damage estimated in fixing compensation for granting the right of way. The statutory compensation does not extend to damage or injury not authorized by the charter, such as injuries resulting from carelessness, negligence or willful trespass. So held in *Carriger v. East Tenn., Va. & Ga. R. Co.*, 76 Tenn. 388.

III. ARISING FROM LAWFUL BUSINESS.**A. General Rule.**

A nuisance may result from the carrying on of a lawful business, and where such is the case, the person sued on account of the nuisance cannot escape liability on the ground that the business was a lawful one.

CONNECTICUT.—*Bishop v. Banks*, 33 Conn. 118; *Kaspar v. Dawson*, 71 Conn. 405, 42 Atl. 78; *Parker v. Union Woolen Company*, 42 Conn. 399; *Whitney v. Bartholomew*, 21 Conn. 212.

INDIANA.—*Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 47 N. E. 2.

KENTUCKY.—*Ashbrook v. Commonwealth*, 64 Ky. 139.

MARYLAND.—*Scott v. Bay*, 3 Md. 431; *Fertilizer Co. v. Spangler*, 86 Md. 562, 39 Atl. 270; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 Atl. 900.

MICHIGAN.—*People v. White Lead Works*, 82 Mich. 471, 46 N. W. 735.

NEW JERSEY.—*Attorney General v. Steward*, 20 N. J. Eq. 415; *Cleveland v. Citizens' Gas-Light Co.*, 20 N. J. Eq. 201; *McAndrews v. Collard*, 42 N. J. L. 189; *Ross v. Butler*, 19 N. J. Eq. 294.

NEW YORK.—*Bohan v. Port Jervis Gas-Light Co.*, 122 N. Y. 18, 25 N. E. 246.

NORTH CAROLINA.—*Dorsey v. Allen*, 85 N. Car. 358.

PENNSYLVANIA.—*Gavigan v. Atlantic Refining Co.*, 186 Pa. St. 604, 40 Atl. 834.

VERMONT.—*Curtis v. Winslow*, 38 Vt. 690.

B. Other Statements and Illustrations of Doctrine.

Any business, however lawful in itself, which, from the place or manner in which it is carried on, materially injures the property of others, or affects their health, or renders the enjoyment of life phys-

Note

ically uncomfortable, is a nuisance which may be enjoined. So held in *Attorney General v. Steward*, 20 N. J. Eq. 415.

In *Bohan v. Port Jervis Gas-Light Co.*, 122 N. Y. 18, 25 N. E. 246, it is held that a person carrying on a lawful business on his premises, in such manner as to prove a nuisance to his neighbor, is liable in damages.

1. Illustrations.

a. **Blacksmith Shop—Location.**

The occupation of carriage making, or of a blacksmith, is a lawful one; and a building erected for its exercise is not a nuisance per se. But if such building, though erected on the builder's own land, and occupied in the usual manner, be in an improper locality, where its use will probably result in an injury to another, this is, of itself, a wrongful act, for which the wrongdoer is responsible to one essentially injured thereby. So held in *Whitney v. Bartholomew*, 21 Conn. 212.

b. **Smoke—Noise—Odors Not Injurious to Health—Injunction.**

When the prosecution of a business, of itself lawful, in the vicinity of a dwelling house, renders the enjoyment of it materially uncomfortable by the smoke and cinders, or noise or offensive odors produced by such business, although not in any degree injurious to health, the carrying on such business there is a nuisance, and will be restrained by injunction. So held in *Ross v. Butler*, 19 N. J. Eq. 294.

c. **Dense Smoke for Twelve Hours Twice a Month.**

In *Ross v. Butler*, 19 N. J. Eq. 294, it is held that a dense smoke laden with cinders, continued for twelve hours twice a month, falling upon and penetrating houses and premises, at distances varying from forty to two hundred feet, constitutes a legal nuisance.

d. **Manufactory—Subsequent Erection of Residence.**

In *People v. White Lead Works*, 82 Mich. 471, 46 N. W. 735, it is held that where after the establishment of a manufacturing business the adjacent vacant land is utilized by the owners for resident purposes, to whom its continuance becomes a nuisance, the business must give way to the rights of the public, and those prosecuting it must devise some means to avoid the nuisance, or must remove or discontinue such business.

e. **Noises—Slaughter House.**

A nuisance may be produced by offensive sounds in the prosecution of business lawful per se; and the bleating of calves kept over night at a slaughter house to be slaughtered in the morning, to the serious annoyance of a family dwelling near, was held to be a nuisance and enjoined against. *Bishop v. Banks*, 33 Conn. 118.

f. **Offensive Odors Not Producing Disease.**

Offensive odors of a loathsome, though lawful trade, if detrimental to the comfort of those dwelling around and to passersby, are a nuisance, although not actually producing disease. So held in *Ashbrook v. Commonwealth*, 64 Ky. 139.

g. **Stable in City.**

In *Kaspar v. Dawson*, 71 Conn. 405, 42 Atl. 78, it is said in the opinion: "The authorities are numerous that a barn or stable within the limits of a city and in proximity to residences is not necessarily a nuisance, since it may be so built and kept that those living near are not necessarily annoyed by odors proceeding from them; but although the purpose for which it is used be a lawful one, and though it be built by one upon his own land, yet when it is so constructed or used that the smells or noises therefrom are so offensive and disagreeable as to render life uncomfortable to those dwelling in neighboring houses, it is a nuisance, and a court of equity, upon proper application, will restrain the owner or keeper of such stable from so using his property as to injury his neighbor."

Note

h. Use of Steam Whistle.

Although a person has a right to use a steam whistle in the course of his business, it may be so used as to become a nuisance, but is not necessarily one. So held in *Parker v. Union Woolen Company*, 42 Conn. 399.

i. Distillery—Smoke and Noise.

But where a distillery is established under authority from the city, and it is not shown that it is not properly conducted and with due regard to the police regulations of the city, an abutting owner must put up with the inconvenience caused by the smoke and noise incidental to the operation of the distillery. So held in *Lewis v. Bohan, Thorn & Co.*, 28 La. Ann. 130.

j. Lawful Business—Evidence Must Be Convincing.

And neither a lawful business, nor the erection of any building or works for such business, will be enjoined merely because it is supposed or alleged that such business will be a nuisance to a dwelling house near it; it must be clear that the business will be a nuisance, and that it cannot be carried on so as not to be such. *Duncan v. Hayes*, 22 N. J. Eq. 25; *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 47 N. E. 2.

IV. EFFECT OF EXERCISE OF CARE AND SKILL.

Where a nuisance exists, it is no defense, either to an action by public authorities or by an owner of private property, that a reasonable degree of skill and care was used to prevent it from injuring others.

ENGLAND.—*Truman v. London & Brighton Ry. Co. (Eng.)*, L. R. 25 Ch. Div. 423.

UNITED STATES.—*Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 11 Am. & Eng. R. Cas. 15; *Chicago G. W. Ry. Co. v. First Methodist Episcopal Church (C. C. A.)*, 102 Fed. Rep. 85.

ILLINOIS.—*Laffin, etc., Powder Co. v. Tearney*, 131 Ill. 322, 23 N. E. 389.

INDIANA.—*Evansville & C. R. Co. v. Dick*, 9 Ind. 433.

KANSAS.—*Burlington v. Stockwell*, 5 Kan. App. 569.

MARYLAND.—*Scott v. Bay*, 3 Md. 431; *Susquehanna Fertilizer Co. v. Spangler*, 86 Md. 562, 39 Atl. 270.

MICHIGAN.—*People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735.

MISSOURI.—*Bielman v. Chicago, etc., R. Co.*, 50 Mo. App. 151.

NEW JERSEY.—*Costigan v. Pennsylvania R. Co.*, 54 N. J. L. 233, 23 Atl. 810; *McAndrews v. Collerd*, 42 N. J. L. 189; *Hayes v. Waverly & P. R. Co.*, 51 N. J. Eq. 345, 27 Atl. 648; *Tinsman v. Belvidere Delaware R. Co.*, 2 Dutch. (N. J.), 148.

NEW YORK.—*Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10, 8 N. E. 537.

NORTH CAROLINA.—*Staton v. Norfolk & Carolina R. Co.*, 111 N. Car. 278, 16 S. E. 181, 52 Am. & Eng. R. Cas. 686.

OHIO.—*Cincinnati & Spring Grove Avenue St. Ry. Co. v. Cummins*, 14 Ohio St. 423.

PENNSYLVANIA.—*Hauck v. Tidewater Pipe Line Co.*, 153 Pa. St. 366, 26 Atl. 644.

SOUTH CAROLINA.—*Frost v. Berkeley Phosphate Co.*, 42 S. Car. 402, 20 S. E. 280.

TENNESSEE.—*Ducktown Sulphur, Copper & Iron Co. v. Barnes (Tenn.)*, 60 S. W. 593.

UTAH.—*People v. Burtleson*, 14 Utah 258, 47 Pac. 87.

WISCONSIN.—*Pennoyer v. Allen*, 56 Wis. 502, 14 N. W. 609.

A. Lawful Business—Exercise of Care No Defense.

In *Frost v. Berkeley Phosphate Co.*, 42 S. Car. 402, 20 S. E. 280, it is held that if the owner of land uses it for the prosecution of a lawful business from which injury to his neighbor's property will neces-

Note

sarily or probably ensue, he is liable for damages so resulting, even though he may have used reasonable care in the prosecution of the business.

B. Factory—Noxious Vapors—Exercise of Skill and Care.

In *Fertilizer Co. v. Spangler*, 86 Md. 562, 39 Atl. 270, it is held that there is a limit to the discomforts and annoyances to which a party may be required to subject himself by living in a city or a manufacturing district; and if the noxious vapors emitted by defendants' factory interfere with the comfortable enjoyment of plaintiff's property and occasion material injury to the same, it is no defense that the locality in question is one where many factories are situated, and that defendants' trade is lawful and useful, and he exercised skill and used the most approved appliances in the management of the works.

C. Use of Dangerous Materials.

Legislative authority to a private corporation, or an individual, to do a work for its or his own profit, does not include authority to use, at whatever hazard to the persons or property of others, dangerous materials, even though they are necessary to the convenient prosecution of the work; and they will be liable for injury from such use, although no negligence or want of skill in executing the work is proved, and liable for actual damages, even though they show that they have done the work in the most careful manner. So held in *McAndrews v. Collierd*, 42 N. J. L. 189.

D. Stock Yards—Location—Good Faith—Exercise of Care—Injunction.

In *Truman v. London & Brighton Railway Co.*, L. R. 25 Ch. Div. 423, an action for damages and for an injunction to restrain a nuisance created by the maintenance by the railroad company of cattle yards at its station at East Croyden. It appeared that the company was authorized by its charter to purchase land in such places as it should deem eligible for the purpose of providing station yards for loading and unloading cattle, etc. It purchased lands for that purpose adjoining its East Croyden station, but near the dwelling of plaintiff. The court found that the company acted in good faith in selecting the side and conducted the business with all practicable care, but also found that it created a nuisance to the plaintiff, and granted the injunction.

E. Coal Bins—Necessary Location—Exercise of Care—Injunction.

In *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10, 8 N. E. 537, it appeared that defendant erected upon a lot, adjoining a dwelling house owned by plaintiff, coal bins for its road, and used the same in operating it; that the smoke, coal dust, etc., caused by such use filled plaintiff's house, rendering it untenable. It was held that the engine house as used was a nuisance; that the statutory authority conferred upon defendant to run its trains over the Harlem road did not sanction the committing of such a nuisance; that an action was maintainable to recover damages and to restrain the nuisance; and that in such action it was no defense that it was necessary for defendant to have its engine house located where it was, or that in the management of it all practicable care was exercised.

F. Smelting Works—Unwholesome Gases—Suitable Location and Proper Operation.

Where the property of adjoining land owners is injured and their health endangered by smoke and gases from smelting works, an action for damages lies, though the business was carried on in a suitable locality, with the most approved appliances; and the fact that works could not be operated without giving rise to noxious vapors is no defense to such action. So held in *Ducktown Sulphur, Copper & Iron Co. v. Barnes* (Tenn.), 60 S. W. 593.

Note

V. EFFECT OF NEGLIGENCE OR WANT OF SKILL.

Where the injuries to private property are the result of negligence or lack of skill in exercising the authority granted, the legislative sanction under which the act or thing was done is no defense to a suit by the party injured. *St. L. I. M. & S. Ry. v. Walbrink*, 47 Ark. 330, 1 S. W. 545; *Georgia R. & Banking Co. v. Maddox* (Ga.), 5 R. R. R. 566, 28 Am. & Eng. R. Cas., N. S., 566, 42 S. E. 315; *Illinois Cent. R. Co. v. Grabill*, 50 Ill. 241; *Terre Haute & Ind. R. Co. v. McKinley*, 33 Ind. 274; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62; *Jungblum v. Minneapolis, N. U. & S. W. R. Co.*, 70 Minn. 153, 72 N. W. 791; *Adams v. Durham & N. R. Co.*, 110 N. Car. 325, 14 S. E. 857; *Edmundson v. Pittsburgh, M. & Y. R. Co.*, 111 Pa. St. 316, 2 Atl. 404; *Henry v. Ohio River R. Co.*, 40 W. Va. 234, 21 S. E. 863; *Taylor v. Baltimore & O. R. Co.*, 39 Am. & Eng. R. Cas. 259, 33 W. Va. 39, 10 S. E. 29; *Dolan v. Chicago, M. & St. P. Ry. Co. (Wis.)*, 8 R. R. R. 133, 31 Am. & Eng. R. Cas., N. S., 133.

A. Sewers—Odors—Percolation—Not a Taking—Damages—Action for Tort.

Mass. St. of 1881, c. 303, § 3, authorizing the city of Boston to take land at or near the line of a certain sewer and to construct works for treating the sewerage and freeing it from noxious and offensive matters, and providing for compensation for the land so taken, did not authorize the city to create a serious nuisance to neighboring property by offensive odors and filthy percolations into and through the soil; and such a nuisance, if created, does not constitute a substantial taking, compensation for which must be sought under the statute, but recovery may be had in an action of tort for damages. So held in *Bacon v. Boston*, 154 Mass. 100, 28 N. E. 9.

B. Negligence in Construction or Operation of Railroad.

Of course, legislative authority to construct and operate a railroad does not protect the company from liability for injuries resulting from its negligence. *Driscoll v. Norwich & W. R. Co.*, 65 Conn. 230, 32 Atl. 354; *Georgia R. & Banking Co. v. Maddox* (Ga.), 5 R. R. R. 566, 28 Am. & Eng. R. Cas., N. S., 566, 42 S. E. 315; *Cleveland, C. C. & St. L. Ry. Co. v. Pattison*, 67 Ill. App. 351; *Illinois Cent. R. Co. v. Grabill*, 50 Ill. 241; *Adams v. Durham & N. R. Co.*, 110 N. Car. 325, 14 S. E. 857; *Henry v. Ohio River R. Co.*, 40 W. Va. 234, 21 S. E. 863; *Taylor v. Baltimore & O. R. Co.*, 33 W. Va. 39, 10 S. E. 29, 39 Am. & Eng. R. Cas. 259.

In *Taylor v. Baltimore & O. R. Co.*, 39 Am. & Eng. R. Cas. 259, 33 W. Va. 39, 10 S. E. 29, it is held that where a person or corporation is vested with authority by the legislature to do an act, it will be protected from all responsibility and liable to no suit at law or in equity, provided what it is authorized to do is done carefully and skillfully, though without such authority it would have been a nuisance; but if done carelessly and unskillfully, and damages result from such carelessness and want of skill, it will be responsible.

C. Overflow of Water—Negligent Construction.

In *Henry v. Ohio River R. Co.*, 40 W. Va. 234, 21 S. E. 863, it is said in the opinion: "That, though a work of improvement, like a railroad, is lawful and under authority, yet, if damage result to an individual by overflow of water by reason of negligent construction, he can recover, is well settled."

D. Negligence in Use of Grant—Damages—Express Lexislative Exemption.

A corporation which has been granted a right to lay out and construct and operate a railroad, is regarded as having promised to pay just damages to a person injured by its want of care in the use of its grant; and it ought not, upon grounds of public policy, to be absolved

Vincent Bros. v. New York, etc., R. Co

from such promise except by a statute to that effect so distinct as not to be open to mistake or inference. So held in *Driscoll v. Norwich & W. R. Co.*, 65 Conn. 230, 32 Atl. 354.

E. Terminal Yard—Improper Construction or Operation.

A railroad terminal yard, though authorized by statute, may become a nuisance by improper construction, or by subsequent improper operation. So held in *Georgia R. & Banking Co. v. Maddox (Ga.)*, 5 R. R. R. 566, 28 Am. & Eng. R. Cas., N. S., 566, 42 S. E. 315.

F. Railroad—Must Be Necessary Result.

Legislative authority to construct and operate a railroad does not relieve the company from liability for a nuisance, unless the nuisance arises as a necessary and natural result where proper care is exercised. So held in *Cleveland, C. C. & St. L. Ry. Co. v. Pattison*, 67 Ill. App. 351.

G. Obligation Not to Injure Another—Maxim Applicable to Railroads—Negligence—Damages.

The maxim, "use your own property, so as not to injure another," is quite as applicable to a railroad corporation as to individuals, except so far as the law creating it may have granted to it immunity, and a recovery can and should be had for such damages as arise out of the careless and negligent acts of a railroad company in regard to any usual and necessary appurtenance to their road. So held in *Illinois Cent. R. Co. v. Grabill*, 50 Ill. 241.

H. Watercourse—Unnecessary Diversion—Cheaper Construction—Grant of Right of Way.

Where it appears that a railroad diverted one stream into another so that the waters from both might be conducted through one channel; and that such diversion was not necessary to insure the safety of the road, but merely for the purpose of lessening the cost of construction, the owner of the land so damaged was entitled to recover for resulting injuries, notwithstanding he may have granted the right of way. So held in *Adams v. Durham & N. R. Co.*, 110 N. Car. 324, 14 S. E. 857.

A. R. Y.

VINCENT BROS. v. NEW YORK, N. H. & H. R. CO.

(Supreme Court of Errors of Connecticut, Dec. 16, 1904.)

[59 Atl. Rep. 491.]

Railroads in Streets—Abolition of Grade Crossings—Use of Private Property—Damages—Effect of Occupation Prior to Payment of Damages—Defaulting Railroad.*

Under the act of 1895 (Sp. Acts 1895, p. 416) appointing a special commission to act for the city of Bridgeport in agreeing with a railroad entering the city as to the abolition of its grade crossing and the division of cost thereof between the city and the railroad, and an agreement made in pursuance thereof under which the railroad was required to do the work, the act of the railroad in occupying private property in carrying out the agreement without a pre-appraisal and prepayment of damages does not render the railroad such a forcible trespasser that it is to be subjected to any greater liability in damages in a suit

*As to the rights of abutting owners as affected by the construction and operation of steam railroads in streets, see foot-note appended to *Bork v. United New Jersey R. & Canal Co.* (N. J.), 11 R. R. R. 115, 34 Am. & Eng. R. Cas., N. S., 115, where all the preceding authorities in this series are collected.

Vincent Bros. v. New York, etc., R. Co

by property owners who suffered damage by the temporary occupancy of a street on which their property abutted, in the prosecution of the work, than it would have been had the damages been appraised and paid before the damages were suffered, even though the railroad defaulted and gave notice under the statute.

Same—Same—Use of Private Property—Measure of Damages.

Under the act of 1895 (Sp. Acts 1895, p. 416) and an agreement by the special commission acting for the city of Bridgeport with a railroad entering the city as to the abolition of its grade crossings, the measure of damage for the temporary occupancy of a street in the prosecution of the work and deprivation of property owners conducting a business therein of access to their place of business in the reasonable value of the use of the premises to the plaintiffs for the purposes for which they were using them, including compensation for such damages to their premises and goods and necessary expense incurred in saving them from further damage, not included in the diminution in value of the use of the premises, as were caused by the defendant's acts, and which they could not have avoided by the use of reasonable care and forethought.

Same—Same—Same—Element of Damages.†

Where plaintiffs were engaged in a wholesale grocery, grain, and meat business, it was error to allow items of damage for money paid for extra team and help and the extra price paid for beef and pork to an amount exceeding the value of the plaintiffs' premises.

Appeal from Superior Court, Fairfield County; John M. Thayer, Judge.

Action by Vincent Bros. against the New York, New Haven & Hartford Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Arthur M. Marsh, for appellant.

Stiles Judson, Jr., for appellees.

HALL, J. The plaintiffs were the owners of land and buildings fronting on North Railroad avenue, a highway in Bridgeport, and upon which premises they conducted the business of selling at wholesale grain, groceries, meat, and other merchandise. For the purpose of performing the work of removing the grade crossings in the city of Bridgeport under a special act of the General Assembly passed in 1895 (Sp. Acts 1895, p. 416), and under the orders of the railroad commissioners, and under the provisions of the agreement between the railroad company and certain representatives of the city of Bridgeport made by authority of said special act, the defendant closed North Railroad avenue in front of and to the east and west of the plaintiffs' property, and built a fence along the north side of said street, which in front of plaintiffs' store was just inside of the curbstone, and occupied said closed portion of the street with materials and apparatus suitable for the work which it was performing, and placed thereon two railroad tracks upon which it operated its trains

†As to whether an abutting owner is entitled to compensation from steam railroads and street railways, see foot-note appended to Knapp & Cowles Mfg. Co. v. New York, etc., R. Co. (Conn.), 11 R. R. R. 134, 34 Am. & Eng. R. Cas., N. S., 134; foot-note appended to Stockdale v. Rio Grande Western R. Co. (Utah), 12 R. R. R. 527, 35 Am. & Eng. R. Cas., N. S., 527.

from about December 1, 1899, until about April 1, 1901. The complaint describes both the direct damage to the property actually taken by temporarily imposing the additional servitude of a steam railroad upon that part of the highway of which the plaintiffs owned the fee, subject to the public easement, and the consequential injury to the plaintiffs, as owners of the property adjoining the highway, by temporarily depriving them of access to it. The plaintiffs filed a bill of particulars of their extra expense and damage on account of the obstruction of the highway by the railroad during said period, in which their total loss is stated to be \$28,070.43. The notice of defense upon the hearing in damages set forth the facts, showing that the occupation of the highway and the use of the additional tracks were necessary acts in the performance of the work required by said resolution of the General Assembly and the agreement entered into under said act and by the orders of the railroad commissioners. The trial court found the value of the plaintiffs' premises to be \$4,500, and the rental value during the time the defendant so occupied the street, and without reference to the particular use to which they were applied by the plaintiffs, to be \$50 a month, and assessed the plaintiffs' damages at \$6,150.64, and as made up of these items:

Cash paid to Lyon for access to Howard avenue.....	\$450 94
Carting materials for driveway.....	15 00
Cash paid * * * for materials and labor for change in building.....	150 00
Cash for extra teams and help during interruption.....	2,316 98
Damage to goods by surface water.....	971 94
Extra price paid for beef and pork.....	2,232 28
Rebuilding gutter destroyed.....	13 50

\$6,150 64

In the memorandum of decision the trial judge states that this is not an action for the recovery merely of compensation for land taken for a public use, and that the damages are not to be assessed according to the rule applicable to such taking, and that by suffering a default and giving notice under the statute the defendant has treated the action as one in the nature of trespass for a tort.

The rule of damages for injuries unlawfully inflicted by a mere trespasser is somewhat different from that which is applicable to injuries necessarily resulting from the proper performance of an act for the general good of the community. There are some inconveniences, and even losses, which individuals may justly be required to suffer without specific compensation for the public welfare, for which, when caused by the unlawful acts of a mere trespasser, damages should be recoverable. Whether the defendant is to be regarded as a forcible trespasser in thus closing and occupying North Railroad avenue and placing and using the steam railroad tracks laid upon it, or as engaged in the performance of a public

duty imposed by the state, may therefore be an important question in the assessment of damages in this case. *Lewis on Eminent Domain*, § 493, p. 652. If the present suit is of the nature of the common-law action of trespass, it is because the allegations of the complaint show that by closing a highway in the city of Bridgeport in front of the plaintiffs' land and laying and operating a railroad upon it the defendant is liable for the alleged injuries to the plaintiffs' property. The complaint contains no express allegation of an unlawful, or wrongful, or forcible entry, as in the case of *McKeon v. New York, N. H. & H. R. Co.*, 75 Conn. 343. 53 Atl. 656, 61 L. R. A. 730, or in declarations under the common law or under the practice act for trespass upon land, nor is there any express averment that the defendant acted wrongfully, improperly, or negligently in so occupying the highway and performing said work, or that it wrongfully failed to have the damages to abutting property owners assessed and prepaid, or to do any other act required to enable it to lawfully occupy the highway temporarily in the prosecution of the public work. On the contrary, the averments of the complaint seem to be entirely consistent with the claim that under the state Constitution, as well as under the defendant's charter, the plaintiffs are entitled to compensation for the alleged damage, although such occupation of the street was lawful, and although in all respects the defendant lawfully and properly performed the work in which it was engaged. It is therefore not clear how, by suffering a default, the defendant so admitted that it was a trespasser as to deprive it of the right of having the damages assessed in accordance with the rule applicable to the taking of land for a public use.

But if the complaint, in effect, charges the defendant with having unlawfully so closed and used the highway, the admission by the default did not prevent the defendant from disproving such allegation upon the hearing in damages, nor from alleging in its notice, and proving, facts showing that it was lawfully acting in obedience to a command of the state, and was therefore only liable for such damages as were required to be paid for lawfully taking private property for a public use. The facts showing in what capacity and by what authority and in what manner the defendant acted were alleged in the notice and found by the court. These facts show that the defendant performed these acts "with due care, with entire honesty and sound discretion," and by authority of and in the manner required by an act of the General Assembly, and that it cannot be regarded as a trespasser unless for the reason that it does not appear that the defendant caused the plaintiffs' damages to be appraised and paid before the highway was thus occupied. That the lawful and proper location and operation by the defendant of a steam railroad upon North Railroad avenue in prosecuting, at the command of the state, the work of removing the grade cross-

ing in Bridgeport, was such a taking of land as rendered the defendant liable to abutting proprietors owning a fee in the highway, both for the injury to the land actually taken within the limits of the highway, and for the resulting injury to the owner of the land adjoining the highway not actually taken, but to and from which such abutting owners were thus deprived of access, was decided in the cases of *McKeon v. New York, N. H. & H. R. Co.*, 75 Conn. 343, 53 Atl. 656, 61 L. R. A. 730, and *Knapp & Cowles v. New York, N. H. & H. R. Co.*, 76 Conn. 311, 56 Atl. 512. But the question in those cases was whether there was any liability at all upon the part of the defendant for such injuries under such circumstances; not what the proper measure of damages was, nor what the legal elements of the damage were for which they might be liable. In these cases, as in cases in other jurisdictions, one entering upon land for a public use without having compensated the owner for the injury to his property is sometimes spoken of as a trespasser, rather because he may be held liable in an action at law for the injury to property appropriated for a public use than because he is to be regarded as a wrongdoer entering upon land without any right or authority whatsoever, and who may not render his occupancy lawful by afterwards compensating the owner for the injuries to his property to their full extent, or as one who is not entitled to have the compensation to be so paid limited to the sum which the law requires to be paid as compensation for injuries to property arising from a lawful taking of land for a public use. *Childs v. Newport*, 70 Vt. 66, 39 Atl. 627; *Jones v. New Orleans, etc., Co.*, 70 Ala. 227. If the act of 1895 and the agreement under it, both of which are given in full in the case of *Mooney v. Clark*, 69 Conn. 241, 37 Atl. 506, are valid, and the acts of the defendant were in accordance with the provisions of such act and agreement, the defendant cannot be treated as a trespasser in any other sense than that it must compensate the owner of property lawfully taken or injured in the prosecution of a public work, and that such compensation may be recovered in an action at law in the nature of the common-law action of trespass or trespass on the case.

By the act of 1895 and the agreement referred to, the duty and expense of removing the grade crossings in Bridgeport were imposed by the state upon the defendant railroad company and the city of Bridgeport. Concerning that act and agreement this court said in *Mooney v. Clark*, 69 Conn. 241, 37 Atl. 506, at page 256, 69 Conn., page 509, 37 Atl.: "The Legislature, having determined that the grade crossings of the various streets in that city constitute a nuisance dangerous to life, has proceeded in the way pointed out in the resolution and agreement to compel the city and the railroad company to become the owners of new highways and new railroads to accomplish that end, has determined who shall do the work

and who shall pay the expenses, and is doing this through the instrumentality of the persons named in the resolution and the railroad commissioners. * * * This governmental act does not increase or diminish the assets of the city or of the railroad." Manifestly, this duty was thus placed upon these two corporations because the powers, duties, and liabilities granted and imposed upon them, respectively, by their charters, concerning the construction and operation of railroads, and the opening, repairing, and discontinuing of streets, and the payment of damages to persons whose property might thereby be taken or injured, rendered them the most suitable agencies for the performance of this work. The charter of each corporation authorized it to take land for public purposes, made it liable to pay damages arising to persons whose property was so taken, and provided for the appraisal and prepayment of such damages. In behalf of both these corporations the railroad company was required by the terms of the agreement to do the work of construction, grading of tracks and streets, etc., both upon its own land and upon the highways affected by the plans, and was given the full use of, and the right to temporarily close, such streets or portions of streets as might be necessary for the convenient prosecution of the work. The Act of 1895 itself provides for the taking, by the railroad company or the city, of land, or any interest therein, deemed necessary for the carrying out of the work in any and all particulars in the manner provided by statute for the taking of land for railroad purposes; and the provision in the agreement for the payment of the cost of the entire work expressly includes damage for the taking of land, and all damage to property resulting from a discontinuance of streets or parts of streets; but neither the resolution nor the agreement contain any express provision for the prepayment of the damages which might result to adjoining landowners from such temporary taking of a highway for railroad purposes as might be found necessary in the prosecution of said work.

It is evident that the real injuries complained of in this action are those resulting from depriving the plaintiffs of their right of access to the adjoining land, "which, to the extent that the street was a necessary and convenient means of access to his lot, was as much a valuable property right as the lot itself" (Indiana, etc., R. Co. v. Eberle, 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225), rather than the injury to the land itself already dedicated and used as a highway, and along the south side of which the railroad so temporarily moved into the highway had been operated for many years. Our Constitution does not expressly provide for the prepayment of the compensation for land taken for a public use. Whether, under our Constitution, the Legislature may authorize the taking of land for a public use without the prepayment of compensation for the permanent consequential

Vincent Bros. v. New York, etc., R. Co

injuries arising therefrom to the owners of adjoining land, is a question which has been raised in several cases in this state, but not decided. *Hooker v. New Haven & N. Co.*, 15 Conn. 312-326; *Platt v. Milford*, 66 Conn. 320-335, 34 Atl. 82; *Gilpin v. Ansonia*, 68 Conn. 72-79, 35 Atl. 777. It is, however, held in the last case cited that the sum payable "for damages sustained by the owner of adjoining land by reason of a change of grade in the highway does not represent compensation for the 'taking of property' within the meaning of the Constitution." The provisions of the respective charters of the railroad company and the city as to the appraisal and payment of damages before occupying land taken for a public use are rather applicable to a permanent taking of or injury to property, or at least to a taking or injury the extent of which, and the amount to be paid as compensation for which, may be ascertained with a reasonable degree of certainty beforehand, than to some possible temporary taking in the prosecution of a public work, and possible temporary resulting injuries to property not taken. The use by the defendant from which the injuries resulted in the present case was of a highway, was a temporary use, was of uncertain duration, and the extent and character of the injury which might result therefrom to the owners of property not taken was therefore uncertain, and was such as is generally not required to be preappraised and prepaid. *Great Falls Mfg. Co. v. Garland (C. C.)* 25 Fed. 521; *Orr v. Quimby*, 54 N. H. 590; *Denver, etc., R. Co. v. Domke*, 11 Colo. 247, 17 Pac. 777; *Spencer v. Point Pleasant R. Co.*, 23 W. Va. 406.

It is admitted in the plaintiffs' brief that the damages they seek to recover are such that they could not have been ascertained and appraised beforehand upon condemnation proceedings. While the purposes of this case do not require us to hold that it was within the power of the Legislature to authorize this work to be performed by these agents without prepaying that damage for which they were to be held liable, resulting from such temporary occupancy of highways by a railroad as might be found necessary in prosecuting the work, we are clearly of the opinion that such occupancy of North Railroad avenue without a preappraisal and payment of such damages does not render the defendant such a forcible trespasser that it is to be subjected to any greater liability in damages in this action than it would have been had the damages been appraised and paid before the street was so occupied. The rule of damages to be applied in this case is the same as that which would have governed in an appraisal of the damages in condemnation proceedings—just compensation for the injuries. *Nicholson v. New York & N. H. R. Co.*, 22 Conn. 74-78, 56 Am. Dec. 390; *Aldis v. Union, etc., R. Co.*, 203 Ill. 567, 68 N. E. 95; *Davenport, etc., R. Co. v. Sinnet*, 111 Ill. App. 75. That the trial court did not apply this rule, and that it considered the question of

damages from a wrong standpoint, and to the prejudice of the defendant's rights, appears from the language of the memorandum of decision and from the amount of damages awarded in comparison with the full value of the plaintiffs' entire property. Regarding the rule of damages when property is taken for a public use it was said in *Platt v. Milford*, 66 Conn. 320, 332, 34 Atl. 82, 84, which was an action by the owner of land adjoining a highway to recover special damages for a permanent injury to his property caused by a change of grade of the street: Such damage "includes the diminution in the market value of the land caused by the alteration, to be determined by considering everything by which that value is legitimately affected," and that changes reasonably necessary to prevent or modify the reduction in the salable value of the property are properly considered in estimating the present immediate damage. In *Holley v. Torrington*, 63 Conn. 426-432, 28 Atl. 613, 615, which was an action of the same character as that last cited, the court said: "The special damage to the plaintiff's land could be determined only by considering everything by which its value would be affected." *Bradley v. New York & N. H. R. Co.*, 21 Conn. 293, was an action for damages for a permanent injury caused by the raising of an embankment as an approach to a bridge over defendant's railroad in a highway in front of plaintiff's land and blacksmith shop, and thereby interfering with his access to the street. The court said (page 309): "He [the plaintiff] does not complain that his property has been taken from him, or appropriated to the use of the defendant, but that his enjoyment of it is materially and injuriously impaired by their acts. He retains his land, but its value is diminished by those acts." And in speaking of the damages which may be recovered (page 311): "We do not intend, however, to include merely fanciful or speculative damages, but only those of an actual, substantial, definite, and appreciable character." This case was cited as determining the liability of the railroad company in the case of *Burritt v. City of New Haven & New Haven & N. Co.*, 42 Conn. 174-195. *Nicholson v. New York & N. H. R. Co.*, 22 Conn. 74, 56 Am. Dec. 390, was an action for damages for an injury of a similar character to that described in the *Bradley Case*. In discussing the question of whether the damages awarded were excessive, the court said: "The rule of damages, as given in the defendant's charter, is a rational and just rule. When the damages are assessed by freeholders appointed for this purpose in the manner prescribed by the charter, they are to inquire into the extent of them, and they are to assess just damages to the person or persons whose real estate may be taken or injured." And, further, that the rule which would have been the rule for the freeholders in making the assessment was the rule to be applied in that case.

Vincent Bros. v. New York, etc., R. Co

These cases show that it is the purpose of the law that the owner of property adjoining a highway taken or occupied for a public use shall receive just compensation, not only for his property actually taken or occupied in the highway, but also for the injuries, if any, to his property adjoining the highway, which are the natural and proximate consequences of such taking or occupation; and that the diminution in value of the property taken or injured, to be included in the damages, is to be determined by considering everything by which such value is legitimately affected. The rule of damages applied in these cases and in most of those cited by counsel was the rule applicable to a taking or injury which is or may be permanent, and was applied in actions to recover either full compensation for such permanent injury or compensation up to the time of the commencement of the action for a continuing injury. For the injury to land in such cases the diminution in market value is generally the rule of damages applied, because it is generally a fair measure of the loss sustained, whether the owner is compelled to abandon the injured property, or to use it in its impaired condition, or to restore it to its former condition. In the present case both the taking and the injury were temporary, and it was understood they would be, when the street was first closed, and the occupation of the highway and the injury occasioned thereby had ceased before suit was commenced, and, it may be added, the liability of the defendant is not limited to the payment of damages to realty, the language of its charter being that it shall "pay all damages that may arise to any person or persons," and that the damages to be assessed are "just damages to the person or persons whose real estate shall be taken or injured." If the plaintiffs had used these premises merely as a place of residence or for the purpose of renting them, their loss as owners of property so used or rented would probably be fairly measured by the market rental value, or the diminution in such rental value, during the time they were so deprived of access. But where premises are used for manufacturing or business purposes, and have been constructed for or adapted to such use, and for that purpose have been furnished with expensive fixtures, machinery, and appliances, and a permanent and profitable business has been established at that place, compensation for the diminution in the market value of the premises or in the mere rental value during the period of interrupted access is not just compensation for the injury caused by temporarily depriving the owner of the right of access. When the owner is making such a use of the land, it is that use of which he is temporarily deprived, and for the loss of or injury to which he is entitled to compensation. *St. L. V. & T. H. R. Co. v. Capps*, 67 Ill. 607-513; *St. L. J. & S. R. Co. v. Kirby*, 104 Ill. 345; *Sherwood v. St. Paul, etc., R. Co.*, 21 Minn. 127; *Western P. R. Co. v. Hill*, 56 Pa. 460.

It would be unjust to the defendant to hold it liable for

the diminution in market value of the premises after the street was closed upon the theory that it was to remain permanently closed. It might be unjust to hold the defendant liable for the entire expense which might have been required in order to restore the right of access after the street had been closed, so that the premises could be used as they had been before the interruption, since an attempt to do so might have been unreasonable under the circumstances, and such expense might have equaled the full value of the premises which at the end of the temporary interruption were to be restored to the plaintiffs in their former unimpaired condition. It might be unjust to hold the defendant liable for the loss or expense incurred in continuing to conduct their business in the manner they did; and it might be equally unjust to allow the plaintiffs only the market rental value of the premises during the period of the interrupted access, as compensation for the injury which they must necessarily have sustained either by suspending business entirely during that period, or by using the premises in their impaired condition as well as they could, or by moving their business to some other place. The law does not point out the particular course which the plaintiffs should have pursued, but it does require that their conduct should have been reasonable, both in protecting themselves from injury and in diminishing the loss for which the defendant might be liable. The reasonable value of the use of the premises to the plaintiffs for the purposes of the business for which they were using them is the value for the diminution of which, caused by such temporary interruption of access, the plaintiffs are entitled to compensation.

In determining the diminution of such value the court should consider the reasonably necessary loss to the plaintiffs in their said business, caused by such interruption of access, including actual loss of trade and loss of profits necessarily caused thereby, and the reasonably necessary additional labor and expense required to prevent further such loss. *Norwalk v. Blanchard*, 56 Conn. 461-464, 16 Atl. 242; *Platt v. Milford*, 66 Conn. 320-334, 34 Atl. 82; *Pittsburgh, etc., R. Co. v. Vance*, 115 Pa. 326, 8 Atl. 764; *Driver v. Western Union R. Co.*, 32 Wis. 569, 14 Am. Rep. 726. From the facts before us it is difficult to see how the items allowed by the trial court of \$2,316.98 "for extra team and help" and \$2,232.28 "extra price paid for beef and pork," exceeding in amount as they do the full value of the premises, can be regarded as reasonably necessary expenses, to such amount, for the purpose above stated. We assume they were allowed to that amount upon the view taken by the trial court that the defendant was to be regarded as a mere trespasser. In addition to the diminution in value of the use of the premises the plaintiffs are entitled to compensation for such damages to their premises and to their goods, and necessary expense in-

Louisville & N. R. Co. v. Smith

curred in saving them from further damage, not included in the diminution in value of the use of the premises, as may be proved to have been caused by the defendant's acts, and which they could not have avoided by the use of reasonable care and forethought.

The view we have taken of this case renders a new trial necessary.

Error, and new trial granted. The other Judges concurred.

LOUISVILLE & N. R. CO. v. SMITH.

(Supreme Court of Alabama, July 21, 1904.)

[37-So. Rep. 490.]

Trespass—Right of Action.

One rightfully in possession of land, whether having the legal title or not, may properly sue for a trespass thereon.

Railroad Right of Way—Permission of Owner—Interests Acquired.

Where a railroad company, authorized by its charter (Laws 1853, p. 298) to acquire "land for the track of said road not to exceed 150 feet wide," built its road over land by mere permission of the landowner, the company acquired no rights in the land outside of the embankment of the roadbed.

Trespass—Mitigation of Damages—Advice of Counsel.

Evidence of advice of counsel, in mitigation of damages, in an action for trespass on land, is properly excluded, where it does not show that the advice was based on the facts in the case.

Same—Malice—Exemplary Damages—Defenses—Necessary for Maintenance of Railroad.

Where the evidence in an action for trespass on land showed that the trespass was in disregard of a written protest by the landowner, and without any offer by defendant to make compensation, the fact that the acts constituting the trespass were necessary for the proper maintenance of defendant's railroad did not require the withdrawal from the jury of the questions of malice and exemplary damages.

Harmless Error.

The striking out of a special plea, even if error, is harmless, where nothing could have been shown under it which was not available under the general issue, which was pleaded.

Appeal from Circuit Court, Limestone County; Osceola Kyle, Judge.

Action for trespass on land by Elizabeth Smith against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought by the appellee, Elizabeth Smith, against the Louisville & Nashville Railroad Company, to recover damages for the alleged willful, wanton, and malicious trespass upon lands belonging to the plaintiff; the damages claimed in the complaint being \$1,999. The trespass complained of was the cutting of a ditch over part of the lands which abutted upon and adjoined the railroad track occupied by the defendant. The defendant pleaded the general issue, and a special plea (No. 2) in which it set up the fact that the

ditch was cut upon the land which was within what the defendant's predecessors had the right to use for a right of way, and that the defendant was the lessee of the railroad company which had this right granted it by its charter. The plaintiff moved to strike this special plea from the file because it set up nothing more than the general issue. The court granted this motion and struck said plea from the file, and to this ruling the defendant duly excepted. The cause was tried upon issue joined upon plea of the general issue.

On the trial of the case the following facts were shown: The lands upon which the ditch was cut were claimed and occupied by the plaintiff, who was the widow of one Aaron Smith. That said Aaron Smith died in 1884, after having been in possession of and having lived upon said lands since 1850. After his death the premises were set apart to his widow as a homestead, since which time she had lived there, and had been in unquestioned possession. From the building of the railroad until his death her husband had cultivated the land up to the foot of the embankment, and, up to two or three years before the trespass, plaintiff maintained a fence at the foot of the embankment. In 1853 the Legislature of Alabama chartered the Tennessee & Alabama Central Railroad Company (Laws 1853, p. 298), and authorized it to build a road from Decatur to the Tennessee state line. The Tennessee Legislature at about the same time chartered the Tennessee & Alabama Railroad Company and the Central Southern Railroad Company, and authorized the first named to build a road from Nashville to Columbia, and the latter to build from Columbia to the Alabama state line, to connect with the Tennessee & Alabama Central Railroad Company. Said companies completed and put into operation their several roads about 1859 or 1860. In 1865 or 1866, under authority of the Legislatures of Alabama and Tennessee, the said three railroad companies consolidated their roads, and became the Nashville & Decatur Railroad Company. In 1871 the Louisville & Nashville Railroad Company leased the said properties for 30 years, and have since "held, controlled and operated" same. In 1899 another lease was executed to the defendant company, by the Nashville & Decatur Railroad Company, leasing "all its roadbed, easements, properties, depots, franchises and railroad belongings of every kind and character for a period of nine hundred and ninety-nine years." The defendant alleged that it did not know whether the original company or its successors ever secured from the owners of the land through which the road was built any conveyance of any land for its right of way through the disputed premises, but the company built its road by the license or let of the original owners. The company had not assumed or taken possession of the premises in dispute, east or west from the embankment; had not exercised any control over the premises

Louisville & N. R. Co. v. Smith

in dispute until the time of the alleged trespass. The plaintiff served notice on the agent of the defendant not to trespass in any way upon said property, after which defendant dug a ditch on plaintiff's land, about 3 feet wide and 300 feet long, which was necessary for the proper maintenance and operation of said road. The charter of the company authorized it to contract for and receive conveyances for land for said road, not to exceed 150 feet in width, and, when the price could not be agreed upon, the sheriff, upon application, should summon a jury to assess damages.

The bill of exceptions contains the following recital as to the proof of the advice of counsels: "J. W. Judd was then examined as a witness for the defendant, and testified that he lived in Nashville, Tenn., and was a lawyer by profession, and had been a practicing attorney for more than thirty years, and was now, and had been for several years past, the assistant district attorney for the Louisville & Nashville Railroad Company for Tennessee, and Nashville & Decatur Division in Alabama. He was then asked this question: 'State whether or not you advised the officials of the Louisville & Nashville Railroad Company, whose duty it was to maintain, operate, and keep in repair that part of defendant's roadbed running through the land described in plaintiff's complaint, that they had the right to enter upon said lands, not exceeding 75 feet from the center line of the track on each side, for the purpose of doing necessary work in order to maintain, repair, and operate the defendant's road?' The plaintiff objected to this question because it called for illegal, irrelevant, and immaterial evidence, and the court sustained said objection, to which action of the court the defendant then and there, in open court, excepted." The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) If the jury believe the evidence, they will find for the defendant. (2) I charge you, gentlemen of the jury, that, under the undisputed facts of this case, the plaintiff can only recover nominal damages." There were verdict and judgment for the plaintiff, assessing her damages at \$1,000. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Jno. B. Keeble, John W. Judd, and Harris & Oyster, for appellant.

Thos. C. McClellan, for appellee.

SHARPE, J. In the statement of facts agreed on it is recited that plaintiff, "and those through whom she claims, have been, and were at the time of the said alleged trespass, and for twenty years prior thereto, exercising acts of owner-

ship and control by cultivation and otherwise, under claim of right and ownership, of the premises on which the said alleged trespass is charged to have been committed, and up to the foot of the embankment of the railroad track." By a witness it was shown that plaintiff's husband, to whose possession she succeeded, occupied the land from about 1850 until his death, in 1884, when her possession commenced under an allotment of homestead. Prima facie, these facts show that, at the time of the act complained of, plaintiff was in rightful possession of the premises mentioned. The rightful possessor of land, whether having the legal title or not, may properly sue for a trespass thereto. *Boswell v. Carlisle*, 70 Ala. 247; *L. & N. R. Co. v. Hall*, 131 Ala. 161, 32 South. 603.

The act complained of was the digging of a ditch by defendant a few feet from the embankment of, and within 36 feet of the center of, a railroad leased to and operated by defendant. The railroad was completed about the year 1859 or 1860, and was built under a charter granted by an act of the Legislature passed in 1853 (*Laws 1853*, p. 298) to the Tennessee & Alabama Central Railroad Company, which act provided, among other things, for the acquirement by that company, by contract or by condemnation proceedings, of "land for the track of said road, not to exceed one hundred and fifty feet wide." Apparently, by virtue of its lease and sundry transactions preceding it, defendant was at the time of the alleged trespass entitled to use the railroad and all rights of way which were thereto appurtenant, and those rights it sets up as a defense to this action. The facts show the work of digging was necessary to the proper maintenance of the road; that before its commencement neither defendant, nor any of its predecessors in right, had ever exercised or sought to exercise any act of ownership or control over the land at that point adjacent to, and not covered by, the road embankment. From the agreed statement we quote that defendant "does not know whether the original railroad company, the Tennessee & Alabama Central Railroad Company, or any of its successors in title, ever secured from the owners of the lands through which the road was originally built, at the time it was built or thereafter, any conveyance of the land for its right of way through said premises in dispute, nor whether there was any condemnation proceedings, as authorized by the charter, of a right of way through said premises in dispute, but, on the contrary, the company built its railroad through said premises either by the license or let of the original owners, whoever they may have been, and has from that time until now, as aforesaid, claimed, owned, and operated its railroad through said premises."

The "license or let" upon which the main defense is thus rested does not appear to have amounted to more than permission or leave given by the landowners "for the building

of the road through the premises." A license not coupled with a grant or contract cannot operate to convey land or to create an easement. *Hicks Bros. v. Swift Creek Mill Co.*, 133 Ala. 411, 31 South 947, 57 L. R. A. 720, 91 Am. St. Rep. 38; *Wash. on Easements*, 6; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 249; 18 Am. & Eng. Ency. Law, 1128.

Cases there have been in which presumptions were indulged favoring the existence of a right of way coextensive with the limits allowed therefor by statute; but such presumptions, if not made against the party entering in the assertion of rights under the statute, or in the construction of some conveyance or other contract, have usually been based upon a statute differing in terms and effect from the chartering act relied on by defendant. That act created no right of way; its provisions in respect thereto being merely for the acquisition of one within maximum limits of width, without otherwise fixing the area wherein the same should presumptively or otherwise exist. Such provisions, though contained in a public statute, and a fortiori when in a private act, do not impart to a mere license to build a railroad the effect of protecting the builder in the occupation or use of lands not taken in the execution of the license, though they be within the legal limits of width. *Hendrix v. Southern Ry. Co.*, 130 Ala. 205, 30 South. 596, 89 Am. St. Rep. 27; *Nashville, etc., R. Co. v. Hammond*, 104 Ala. 191, 15 South. 935. See, also, *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453. This road having been completed and maintained on other lands for 40 years before defendant's entry thereon, authority for the entry is not to be presumed or inferred from the license to build.

There are authorities tending to support the proposition that advice of counsel based on a disclosure of the facts may, in a case such as the one under consideration, be considered in disproof of malice and in mitigation of damages, as to which see *Sutherland on Damages* (3d Ed.) § 154; *Shores v. Brooks*, 81 Ga. 468, 8 S. E. 429, 12 Am. St. Rep. 332. In *Jasper v. Purnell*, 67 Ill. 358, the court intimated that such advice was so available only in cases of malicious prosecution. However, the question which on the trial called for testimony as to advice of counsel, not having been accompanied by evidence or any offer to produce evidence to show the advice was based on facts of the case, was for that reason, if for no other, subject to objection. *Shores v. Brooks* and *Jasper v. Purnell*, supra.

In respect of the amount of the verdict, no question is raised, except by the refusal of a charge professing to restrict the recovery to nominal damages. For a malicious trespass, injurious to real property, exemplary damages may be awarded; and the act of intentionally injuring such property, in known violation of the possessor's rights therein, is evidence of malice. *Hicks Bros. v. Swift Creek Mill Co.*,

Suffolk & C. Ry. Co. v. West End L. & I. Co

supra; Sutherland on Damages (3d Ed.) § 1031; 19 Am. & Eng. Ency. Law, 623. From the evidence the jury might well have found the ditching was done, not inadvertently, but in intentional disregard of a written protest giving notice of plaintiff's rightful occupation of and claim to the land, and without any offer or purpose on defendant's part to make compensation. From these facts there might have been drawn an inference of malice, to which the further fact that the work was necessary for the proper maintenance of the road was not opposed with such conclusiveness as would have warranted the withdrawal from the jury of the questions of malice and exemplary damages.

The complaint avers and the evidence showed such a violation of complainant's property and property rights as would have entitled her to recover at least nominal damages, irrespective of whether damages greater than nominal were actually sustained; and in such case the existence of such greater actual damages is not, under the law as declared in this state, "an essential predicate to the imposition of exemplary damages." See Ala. Great So. R. Co. v. Sellers, 93 Ala. 9, 9 South. 375, 30 Am. St. Rep. 17, and authorities there cited.

Both the judgment entry and the bill of exceptions show issue was joined alone on the plea of the general issue. So there is nothing in the suggestion that plea 2 was proved. If that plea be treated as stricken out, yet the striking, even if erroneous, would not be cause for reversal, since thereunder no benefit could have been had which was not available under the general issue. The license therein set up as having been given for the building of the road was not in the plea averred or shown to have extended to the taking, use, or occupation of the land on which the trespass was committed.

Affirmed.

SUFFOLK & C. RY. CO. v. WEST END LAND & IMPROVEMENT CO.

(Supreme Court of North Carolina, Dec. 19, 1904.)

[49 S. E. Rep. 350.]

Eminent Domain—Value of Land—Evidence.

In a proceeding to condemn land, evidence to show the value of the land by its location and surroundings is admissible.

Same—Same—Same.

In a proceeding to condemn land for a right of way, a tax list is inadmissible to show the value of the land.

Condemnation of Dedicated Street for Railroad Right of Way—Damages.

Where a railroad condemns the whole of a dedicated street, the abutting owner is entitled to compensation for the full value of the land taken.

Appeal from Superior Court, Pasquotank County; Hoke, Judge.

Suffolk & C. Ry. Co. v. West End L. & I. Co

Special proceedings by the Suffolk & Carolina Railway Company against the West End Land & Improvement Company to condemn land. From a judgment for defendant for \$2,300 damages, plaintiff appeals. Affirmed.

This is a special proceeding to condemn a right of way for railroad purposes through certain lands owned by the defendant. It appears that the defendant bought about 130 acres of land adjoining the corporate limits of Elizabeth City, which is laid off into lots and streets. Some of the streets were improved, while others were not. Among the unimproved streets was Grice street, which was condemned as an entirety as a right of way for the use of the plaintiff, and has been taken for such use. The report of the commissioners does not state the length or width of the right of way, but describes it simply as "all that certain strip of land across the lands of the defendant company and known and described as 'Grice Street.'" The evidence and the plat show that said street is 50 feet wide, including sidewalks; that is, between the building lines. The sole issue was the amount of damages that the defendant was entitled to recover, which were assessed by the jury at \$2,300. There was testimony on both sides. The plaintiff appealed from the judgment rendered.

Pruden & Pruden and E. F. Aydlett, for appellant.

Ward & Thompson, for appellee.

DOUGLAS, J. (after stating the case). The principles involved in this case are few and well settled. Its determination really depends more upon the weight given to the testimony, and that has been settled by the verdict of the jury. The first exception is to the admission of the following testimony given by a witness for the defendant: "There is a street two blocks away, parallel to the one down which the railroad runs, which has been improved at considerable expense, having been paved with brick, and on this street several residences of good size and quality have been erected. The said improved street and the street covered by the right of way of the railroad are parts of the same tract of land, belonged to the defendant company, and are near each other. The said improvements placed upon the property in question increase the value of the whole tract. Cross-streets connected the improved street with Grice street." The record states that it was given on cross-examination. This is denied by the plaintiff. We must assume the truth of the record, but it makes no difference, as we think the evidence was competent in either event. It does not come within the prohibition of the rule affirmed in *Rice v. Railroad*, 130 N. C. 375, 41 S. E. 1031, following *Warren v. Makely*, 85 N. C. 12, and that class of cases. It does not seek to prove the value of one piece of land by comparison with the value of another, but to show its value by its location and surroundings. It is common knowledge that suburban property will sell better if

it is in a good neighborhood, near to a macadamized road, and in the immediate vicinity of churches and schools. If this property is within two squares of a paved street and close to good houses, it would necessarily sell for more than if it were far from any house, with a mile of mudholes between it and the town. This seems to us less a question of law than of the natural and necessary effect of the evidence. The witness had testified on his direct examination that the lots on Grice street were worth \$150 on an average; that the damage would average at least 50 per cent., and would amount in his opinion to \$5,626, being an average of \$75 per lot. On cross-examination he was testifying to facts which tended to show the reasonableness of the opinion he had expressed. We do not find any exception to this evidence in the record, but, as both sides argue it under the assumption that there was an exception, we have considered it in that view. We see no error in its admission.

The second exception is to the exclusion of the tax list which was offered by the plaintiff to show the value of the land in question. It was properly excluded as being clearly incompetent for the purpose for which it was expressly offered. There are cases in which the tax lists have been admitted as some evidence, though slight, of claim of title and of the character of possession by the party listing the same. *Austin v. King*, 97 N. C. 339, 2 S. E. 678; *Pasley v. Richardson*, 119 N. C. 449, 26 S. E. 32; *Barnhardt v. Brown*, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725; *Gates v. Max*, 125 N. C. 139, 34 S. E. 266. Where the mere listing of the land is the act sought to be shown, the tax lists are admissible, because the lister is the actor; but the rule is essentially different where the value of the land is sought to be proved thereby, because the valuation is the act of the assessors, and therefore *res inter alios acta* as between the parties to this proceeding. As was said by the court, through Pearson, C. J., in *Cardwell v. Mebane*, 68 N. C. 485: "The 'tax lists' were not competent evidence to show the value of the land, as the assessors were not witnesses in the case, sworn and subject to cross-examination in the presence of the jury." In that case the tax lists were admitted for the purpose of proving the good faith of the vendees, who were charged with paying their father an exorbitant or fictitious price for the land, but not for the purpose of showing its actual value. In *Ridley v. Railroad*, 124 N. C. 37, 32 S. E. 379, this court, speaking through Clark, J., says: "Acquiescence in listing and payment of taxes by another is evidence against the party out of possession. But the tax valuation being placed on the land by the tax assessors, without the intervention of the landowner, no inference that it is a correct valuation can be drawn from his failure to except that the valuation is too low. Such valuation was *res inter alios acta*, and is not competent against the plaintiff."

The third and last exception is to the following part of his honor's charge, to wit: "The jury would estimate the damages, if any, arising from the impaired value of defendant's land caused by condemnation of plaintiff's right of way; would deduct therefrom any advantages and benefits arising from the construction of plaintiff's railroad which were peculiar to this land, but not such benefits and advantages as were common to this and the public generally; and, on applying this rule, the excess, if any, of the damages over the benefits and advantages, would be the amount to award defendant in response to this issue." It is needless to discuss this question, in view of the recent and well-considered case of *Railroad v. Owners of Platt Lands*, 133 N. C. 266, 45 S. E. 589, in which the rule laid down in the charge is expressly approved. In fact, the plaintiff does not seem to question it as a general proposition of law, but in its brief explains the nature of its objection in the following words: "The objection to the charge of the court is that the court left it with the jury to estimate full damages for the right of way of plaintiff. We think this is error. The street had been appropriated for the public. The property had been laid off in lots, and the streets were necessary for the use of the lots. They are marked on the plat, and the property is being offered for sale in lots, so that the defendant owning this property would be entitled to damages by reason of the additional burden placed upon Grice street, and not for the full damage for the right of way. Grice street, as shown by the plat, is donated for the use of the public, being laid off in lots, and the defendants cannot withdraw the right to the street, and do not claim or desire to do so; therefore they are not entitled to the street which they have donated for the use of these lots and means to sell them, and they can only recover, by reason of the ownership of the adjoining lots, such additional burden as the right of way for the plaintiff shall place upon said Grice street. It is admitted by both plaintiff and defendants that where the railroad right of way goes is Grice street." The plaintiff relies upon *White v. Railroad*, 113 N. C. 610, 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. Rep. 639, and *Hodges v. Tel. Co.*, 133 N. C. 225, 45 S. E. 572, in support of its contention that the defendant can recover only for the additional burden of the railroad right of way. To the same effect is *Phillips v. Tel. Co.*, 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868. We presume that the principle itself is not questioned by either party to this proceeding, however they may differ as to its application. In the case at bar the plaintiff does not in practical effect impose an additional burden upon the street, but takes the street itself from building line to building line, thus rendering it useless as a highway, and destroying the essential purpose of its dedication. It is stated in the evidence that the plaintiff is digging up the entire street, and that the track is

above the level of the surrounding land. This will virtually compel the owners to cut off from the abutting lots enough land to make a street on each side of the right of way, which would not leave sufficient depth for suburban lots in the absence of public sewerage. Moreover, under these circumstances the street would be practically impassable from side to side, and could never be made a handsome or convenient thoroughfare. It is well settled that the defendant is entitled to recover not only the value of the land taken, but also the damage thereby caused to the remainder of the land. Even if the plaintiff should not use the entire right of way, the rule would be the same, as it is not what the plaintiff actually does, but what it acquires the right to do, that determines the quantum of damages. If the plaintiff acquires the right to use the entire street, that land is, in contemplation of law, just as much taken for the purposes of the easement as if it were filled with railroad tracks. Of course, this rule does not apply to subsequent acts of tort not contemplated in the original condemnation. This distinction is clearly pointed out in *Railroad v. Wicker*, 74 N. C. 220, and the rule therein laid down has been uniformly followed by this court. *Brown v. Railroad*, 83 N. C. 128; *Knight v. Railroad*, 111 N. C. 80, 15 S. E. 929; *Mullen v. Canal Co.*, 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833. We are somewhat struck with the action of the original commissioners who assessed the defendant's net damages at \$100, stating in explanation that they had estimated and deducted "the increased value peculiar to part of said abutting land that the said railroad would bring." What this increased value would be, or how it would be brought about, they do not state. The only evidence we find of any such probable increase in value is the statement, made by both the plaintiff's witnesses, that the railroad "opened up the property for factories, and increased the value of the same more than the damages sustained." To destroy property for the purpose for which the owners alone intend it, and turn it into factory sites when there are no factories in sight, is a benefit entirely too remote and contingent to be capable of present estimation. Some of us may have heard of factory sites before, and, as we listened to the siren voice of the real estate agent, have seen lofty factories rise in the air, pouring forth their countless thousands of well-paid operatives seeking to buy a few choice lots in the neighborhood of Eden. Perhaps we have revisited in after years the scene of once bright but faded anticipations, only to find a lonely cow grazing in the middle of Broadway, or a solitary pig pen standing as a monument to buried hopes. It is due to the plaintiff's counsel to say that they did not press this contention in this court either in brief or argument.

There is another matter which, while not under exception, we think deserves attention. The commissioners, in their report condemning the land, describe it as follows: "Did

Richards v. Ohio River R. Co

proceed to condemn, and by these presents do condemn, all that certain strip of land across the lands of the defendant company, and known and described as 'Grice Street,' for a right of way to be used by the plaintiff company for the purposes set out in said petition." It is true the said right of way was fully and correctly described in the plaintiff's petition, which referred to a plat properly filed; but it seems to us that, as the easement is conveyed to the petitioner by the report of the commissioners when confirmed, the said easement should be therein described as fully and correctly as it would be in a grant. Indeed, it might be better if the extent of the easement were also set out in the judgment of the court, although in the present case his honor's judgment could not have been other than it was as the case was presented to him.

The judgment of the court below is affirmed.

RICHARDS v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia, Dec. 20, 1904.)

[49 S. E. Rep. 385.]

Railroad—Negligence—Construction and Operation—Subsequent Purchase of Property—Right to Damages.

One who purchases a lot near an existing railroad, and sustains damages from its negligent construction and maintenance, is not barred of recovery of damage by reason of the fact that the railroad had already been constructed before his purchase.

Action for Nuisance.

Action by one coming to a nuisance for damage from it.

(Syllabus by the Court.)

Error to Circuit Court, Wood County; L. N. Tavenner, Judge.

Action by A. S. Richards against the Ohio River Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

J. W. Vandervort and Van Winkle & Ambler, for plaintiff in error.

V. B. Archer and Wm. Beard, for defendant in error.

BRANNON, J. A. S. Richards brought an action against the Ohio River Railroad Company to recover damages to a house and lot in Williamstown from flood water of the Ohio river, charging that the negligence of the company consisted in making an embankment for its road in a street in front of his house, and failing to make a culvert under its road of sufficient capacity to allow the flood water to rise equally both sides of the embankment, causing the water to dam up against the embankment and flow over and down from it with heavy fall upon the lot, and barring the outlet of the water accumulated in a de-

Uhl v. Ohio River R. Co

pression between the embankment and the hill in the subsidence of the flood equally with the subsidence of the water of the river, causing the water to stand longer on the lot than it would were the culvert larger. There was a judgment on demurrer to evidence for the plaintiff. The case is similar to the case of Uhl v. Ohio River Railroad Company (decided this term) 49 S. E. 378. I do not think it necessary, for the law governing the case, to write an opinion, as the law is amply laid down in the opinion by Judge Poffenbarger in that case.

There is a feature of this case different from the Uhl Case. In this case Richards purchased his property after the railroad had been constructed. This is merely mentioned, but not relied upon as a defense. No authority is cited upon it. It is not supposed the duty of the company to put in a proper passage for water was passed from Richards' grantor to him; but the duty continued, from year to year, as between the company and any one owning the lot, it being no less the duty of the company to protect Richards, though he bought after the construction of the railroad, than it had been to one owning the lot before and after such construction. As the construction and maintenance of the railroad was pursuant to law, we cannot say that its presence was per se a nuisance, but its negligent constructions and maintenance was a private nuisance in nature as to Richards—the same, in effect, as to him, as if unauthorized, because of negligence. The authority did not authorize negligence. It is a private nuisance in such case. Jaggard on Torts, 788; Taylor v. Railroad, 33 W. Va. 39, 10 S. E. 29. He had right to assume that the duty would be performed, and was not in any way bound to refrain from buying a residence there because the railroad was already there. If one comes to a nuisance, that does not debar him in legal proceedings for harm from it or to restrain it. 21 Am. & Eng. Ency. L. 691; 2 Jaggard on Torts, § 236, p. 774; 1 Wood on Nuisances, §§ 76, 802. The same principle applies in this case.

Judgment affirmed.

ULH v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia, Dec. 13, 1904.)

[49 S. E. Rep. 378.]

Watercourse—Overflow.

Overflow waters of a natural stream in times of ordinary flood or freshet, flowing over or standing upon the adjacent lowlands do not cease to be part of the stream, unless and until separated therefrom so as to prevent their return to its channel.

Same—Same—Defective Railroad Culvert—Liability.*

Failure of a railroad company to make culverts in an embankment

*See extensive foot-note appended to Earhart v. Cowles (Iowa), 12 R. R. 243, 35 Am. & Eng. R. Cas., N. S., 243.

Uhl v. Ohio River R. Co

constructed by it for its roadbed, on lands subject to such overflow, of sufficient size to permit the water behind the embankment to rise and fall as fast as the stream does, is negligent and unskillful construction, making the company liable in damages for resulting injury.

Verdict—Failure to Object.

When no objection, by motion to set aside or otherwise, has been made, in the trial court, to a verdict rendered, subject to the action of the court upon a demurrer to the evidence, it cannot be disturbed in the appellate court on the ground of excessiveness or paucity of damages.

(Syllabus by the Court.)

Error to Circuit Court, Wood County; L. N. Tavenner, Judge.

Action by Winnie Uhl against the Ohio River Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

J. W. Vandervort and Van Winkle & Ambler, for plaintiff in error.

V. B. Archer and Wm. Beard, for defendant in error.

POFFENBARGER, P. This case calls upon the court to say whether injury to real estate resulting from interference with the overflowing waters of a navigable river, at a point outside of its banks, by means of an embankment, gives a right of action for damages. There is practically no controversy as to the facts, and in all material respects the question is one of law. The defense is predicated mainly upon three propositions: First, that such waters are deemed to be surface waters; second, that, even if, by the common law, such waters, in England, constitute part of the river, the rivers of this country, by reason of their size and character as great navigable bodies, would, on the general principles of that law, be excepted from the rule, and classed with the waters of the sea; third, that the overflow was the result of an extraordinary rise in the river, the consequences of which the defendant was not bound to anticipate or provide for in the construction of its embankment.

Winnie Uhl was the owner of a lot situated in the town of Williamstown, on the Ohio river, with a frontage of 37 feet on a street running practically parallel with the river, and lying between the lot and the river. From the street the lot falls away into a depression, in the lowest part of which there is a small channel, in which, during part or all of the time, there is a stream of water, fed by springs, which carries, in addition to the water from the springs, the surface water from the basin. Passing on below the limits of plaintiff's property this depression reaches the river at some point not far distant. The defendant located its railroad on the street in front of plaintiff's property, and, passing on down the river, crossed the depression a short distance below it. In the construction of its road the defendant threw up an embankment in the street in front of plaintiff's property, the top of which is three feet above the level of the lot, and maintained

it at about the same height to a point beyond the depression. At the crossing of the drain, the elevation is 10 to 15 feet, and at that point a small opening is made in the fill, called a "culvert." The culvert is three feet square on one side and eighteen inches by two feet on the other. It is sufficient to carry the waters accumulating in the drain from the springs and from the surface, but insufficient to let in the waters from the river, when rising, fast enough to make the rise in the basin keep pace with that of the waters of the river, and to allow the waters in the basin to subside, when the river is falling, as fast as the river goes down. In the flood of 1898 this resulted in the injury complained of. The river rose rapidly, and attained a very high stage. When the river reached the top of the railroad company's embankment, the water in the basin had not attained that height by about seven feet, according to the testimony of witnesses, and the waters from the river flowed over the embankment, and fell upon the plaintiff's premises, tearing up and washing away the soil, undermining the foundation of buildings, flooding a cellar, loosening from its anchorage a frame building called a "cooper shop," containing tools, materials, and barrels, and causing the same to float, and finally to be carried away. When the river subsided, the outflow of the waters in the basin was so impeded by the embankment, with its insufficient culvert, that water remained upon the lot much longer than it would have done but for the interference of the embankment.

In order that the discussion of the main proposition may be unembarrassed by any consideration of the rules of pleading, the action of the court in overruling the demurrer to the declaration will be passed for the present.

The space taken up in the briefs with the discussion of the distinction between the principles of the common law and the Roman civil law governing the rights of parties in respect to surface waters and of the decisions in those states which have adopted the principles of the civil law on that subject serves the purpose of a caution to the court to observe that distinction in attempting to analyze the cases as reported, and deduce from them rules and principles applicable to the questions here presented.

In *Neal v. Railroad Co.*, 47 W. Va. 316, 34 S. E. 914; *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859, and other cases, this court declares the common-law rule on the subject of surface waters to be the law of this state. By that law the owner of property may consume the surface water of his premises, or obstruct or divert the flow of it, without incurring any liability to his neighbor, whether above or below him, although he may be injured by the act; provided that the interference does not amount to a collecting of the surface water on his own land into a body and discharging it as such upon his neighbor's

Uhl v. Ohio River R. Co

premises. See *Gillison v. Charleston*, 16 W. Va. 283, 37 Am. Rep. 763; *Knight v. Brown*, 25 W. Va. 808; *Railroad Co. v. Carter*, 91 Va. 587, 22 S. E. 517; *Gould on Waters*, § 271; *Field v. Inhabitants*, 36 N. J. Eq. 118. Neither the decided cases nor the text-books point out any material distinction between the two systems of law respecting the rights of riparian owners as regards natural water courses. Hence, if the waters of a river which spread over the adjacent lowlands in times of freshets and floods are not surface waters within the meaning of the common law, as to which only that law departs from the principles of the civil law, but remain part of the stream, there is no basis in reason or law for any conflict in the decisions respecting the rights of riparian owners as to property affected by such water. As the Roman civil law makes no distinction between the waters of natural streams and surface waters, it is reasonable to assume that the courts of those states which have adopted it would be uninfluenced in classifying waters, and determine what are and what are not surface waters, by any insensible bias or prejudice, such as might induce courts of the other states to include in surface waters what does not properly belong to that class. But, as the distinction is usually comparatively unimportant in those courts, it may be assumed that they have not bestowed upon the subject as much care and labor as have the courts that observe the other rule. Making due allowance for all this, we are disposed to avail ourselves of such light on the question as those decisions may afford.

In Ohio the civil law is followed. *Butler v. Peck*, 16 Ohio St. 334, 88 Am Dec. 452; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732. The Supreme Court of that state, in *Crawford v. Rambo*, 44 Ohio St. 279, 7 N. E. 429, declines to consider overflowing waters of a river as surface water. In the opinion, at page 282, 44 Ohio St., and page 431, 7 N. E., Minshall, J., says: "It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any one time constitutes the water of the river at such time; and the land over which its current flows must be regarded as its channel, so that when, swollen by rains and melting snows, it extends and flows over the bottoms along its course, that is its flood channel, as when, by droughts, it is reduced to its minimum, it is then in its low-water channel. Surface water is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters, whether derived from the surface or springs; and it then becomes the running water of a stream, and ceases to be surface water."

Georgia is classed as a state in which the rule of the civil

law is adhered to, though the court has made no express declaration to that effect; and in *O'Connell v. Railway Co.*, 87 Ga. 246, 13 S. E. 489, 13 L. R. A. 394, 27 Am. St. Rep. 246, Lumpkin, J., in an able opinion, expressly repudiates the theory that such waters are surface waters within the meaning of either the civil or the common law, and the decision of the case rests upon that ground. In the opinion, at page 253, 87 Ga., and page 491, 13 S. E., 13 L. R. A. 394, 27 Am. St. Rep. 246, it is said: "The surplus waters do not cease to be part of the river when they spread over the adjacent low grounds, without well-defined banks or channel, so long as they form with it one body of water eventually to be discharged through the channel proper."

In Missouri the common law was at one time rejected in so far as it relates to surface waters, and afterwards adopted. In *McCormick v. Railroad Co.*, 57 Mo. 433, and *Shane v. Railroad Co.*, 71 Mo. 237, 36 Am. Rep. 480, it was held that an owner of land could not stop the natural flow of surface water, or divert its course so as to throw it upon the land of his neighbor. In the latter case the court held that "overflowing water from a river in time of flood is surface water within the meaning of this rule." The decision was by a divided court, and the opinion somewhat inconsistent, as declared in the case next to be noticed. The principle of these two cases was discarded in *Abbott v. Railroad Co.*, 83 Mo. 271, 53 Am. Rep. 581. This was a case of obstruction to a natural water course by the erection of a bridge, but the second count in the petition charged an interference with the surface waters "which fell and ran down from higher ground," and the case did not concern the overflow of the river.

The Minnesota court, up to 1888, did not seem to have taken any position with reference to the two systems of law, and in *Byrne v. Railroad Co.*, 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668, it is expressly held that: "The water which in times of ordinary high water overflows the banks of a stream, and is accustomed to flow down over the adjacent lowlands in a defined stream, is subject to the law relating to water courses, rather than to that of surface water." This implies a leaning toward the common-law rule, otherwise it would be unnecessary to note any distinction between the two kinds of water. In Oregon the court, without considering the doctrine of dominant and servent heritage of the civil law respecting surface water, held that: "A stream does not cease to be a water course and become mere surface water because at certain points it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel." *West v. Taylor*, 16 Or. 165, 13 Pac. 665.

In Iowa the court seems to lean toward the rule of the civil law, and in *Sullens v. Railroad Co.*, 74 Iowa, 659, 38 N. W. 545, 7 Am. St. Rep. 501, it is held that where, by build-

ing an embankment across a wide creek bottom, a railroad company caused the surface water of the bottom to flow into the channel, and then to leave it far above the culvert, and flow over plaintiff's land, and then be turned back into the channel again above the culvert, the water was no longer to be considered surface water. This seems to have been nothing more than an interference with a natural water course. The embankment and culvert caused the creek to leave its course and spread over the land, and then go back into its course. Hence the decision has very little bearing on this question. In *Moore v. Railway Co.*, 75 Iowa, 263, 39 N. W. 390, the court decides that water which, in the time of a freshet, leaves the channel of a stream, and spreads over the bottom land, and is forced back into the channel again by a railroad embankment built across its course, is not to be regarded as surface water in considering the sufficiency of the culvert constructed in the embankment. This seems to be another case of mere obstruction to a natural water course.

Coming now to the decisions of courts which apply the principles of the common law in determining the rights respecting surface water, we find that in Indiana it has been held in more than one case that the waters of a river spreading over depressions in the land in the time of a flood are held to be surface water. *Turnpike Co. v. Green*, 99 Ind. 205; *Railroad Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139.

In New York, the surplus water of a stream when flooded is undoubtedly regarded as a part of the stream. Thus, in *Wallace v. Drew*, 59 Barb. 413, it is held that: "It is well settled that every person through whose land a stream of water flows may construct embankments and other guards on the bank to prevent the stream washing the bank away and overflowing and injuring his land. But in doing this he must be careful so to construct them as not to throw the water upon his neighbor's lands, where it would not otherwise go in ordinary floods; otherwise he will be liable for the injury. But this rule does not apply to floods altogether extraordinary and unusual." This proposition was adopted from *Angell on Water Courses*, § 334, and that work adopts it from *Rex v. Trafford*, 1 B. & Ad. 874, a case to be noticed later on.

Though not exactly in point, *Burwell v. Hobson*, 12 Grat. 322, 65 Am. Dec. 247, is said to bear upon the question, and tends strongly to uphold the view that flood waters are to be considered a part of the stream. The syllabus reads as follows: "H., owning lands on both sides of a creek which frequently overflowed its banks, built a dike along the south side of it, to protect his low grounds on that side of the creek; and this caused the creek to overflow the land on the north side still more. At his death his lands were divided by commissioners, who allotted to one of his children the land

on the south side of the creek, and to another (W.) the land on the north side; and in their report they made no allusion to the dike. The son receiving the land on the south side of the creek afterwards sold it to B., and then W., owning the land on the north side, commenced to build a dike on that side, to protect his lands, which would have the effect to destroy the dike built by H. and overflow the low grounds on the south side. B. then filed a bill to enjoin the building of the dike on the north side. Held: (1) B. is entitled to have his dike as it was when H. died, and to have his lands protected thereby; and W. has no right to build a dike on his side of the creek, which would destroy the dike of B. and overflow his low grounds. (2) Equity will interfere to prevent the building of the dike, and will compel W. to abate so much of his dike already built as would injure the dike and low grounds of B." This case follows the principle laid down in *Angell on Water Courses*, just referred to, and is based upon the English decisions. It is urged that the embankment made by the ancestor was not for the purpose of controlling the flow of the water when the stream was within its banks, but only to protect certain land when it overflowed its banks. By this dike he had thrown the water to one side of the stream, and left the land on that side to his son, subject to the burden of the surplus water. While owner of the entire tract, the ancestor had altered the course of the stream on his own premises, as he had a clear legal right to do (*Gould, Wat. § 213*), but after the division of the estate neither of the several owners could so interfere with the stream as to injure the other. When, by the counter dike, the superabundant waters of the flood stage were confined within the channel, kept off the land, and caused to overflow land on the opposite side, the court declared the act to be an actionable obstruction of the stream, and not a mere rightful repulsion of surface water.

The claim of analogy between the case of *Burwell v. Hobson* and the case now in hand seems to be sustained by the views of Judge Moncure in applying to that case the principle declared in *Rex v. Trafford*, 20 Eng. C. L. 498, in which the overflowing waters of a stream formed the subject-matter of the controversy. Embankments, called "fenders," had been erected by the owners of lands bordering on a stream to prevent it from overflowing their lands in times of freshets and floods. These embankments were increased in height from time to time and finally resulted in throwing such a large body of water into the channel of a river into which the brook emptied that it endangered certain canal banks and aqueduct and obstructed navigation in the canal. Neither the aqueduct nor the canal banks was in any degree the cause of the overflow. It had occurred before the erection of the canal, and in times beyond the memory of man. Arches had been made in the aqueduct at points distant from the river to permit this overflowing water to pass through it.

Upon the special verdict showing all the facts, the court of King's Bench held: "That the defendants were not justified, under these circumstances, in altering for their own benefit the course in which the flood water had been accustomed to run; that there was no difference in this respect between flood water and an ordinary stream." In the opinion Lord Tenterden, C. J., said: "The consequence of a judgment requiring the fenders to be reduced may be the production of much mischief in times of flood, not only to the lands of the defendants, but also to a considerable tract of country, unless some other method can be found of carrying off the flood water. But this consequence cannot be properly attributed to the erection of the canal as any blame either in its projectors or present proprietors. On the contrary, it distinctly appears that at the formation of the canal a sufficient provision was made for carrying off the flood water in the course which it had previously taken by the erection of the three arches; and these arches would continue to be sufficient, notwithstanding any increase of water by the improved drainage of the country above, if the ancient cause and outlet of the flood water had not been obstructed by the erection of the fenders. Now, it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited, or has been found, that will support such a distinction." In *Burwell v. Hobson*, Judge Moncre says the King's Bench judgment in *Rex v. Trafford* was reversed in the Exchequer Chamber, "but that court agreed in the principle laid down by the court of King's Bench, though it did not discover upon the special verdict a finding of sufficient facts to warrant its application to the case."

Lawrence v. Railroad Co., 71 Eng. C. L. 643, deals expressly with the subject of flood waters as affected by a railroad embankment. The facts were such as to make it identical in principle with the case now in hand. They are stated by Patterson, J., as follows: "The plaintiff, * * * brings this action for an injury to his land by its being flooded, as he alleges, by the fault of defendants in constructing their railway across the lands of other persons without leaving sufficient openings for the passage of flood water, whereby they were obstructed and penned up and forced upon the lands of the plaintiff." In the opinion he says: "The railway passes across the lowlands adjoining the river Dun, over which the flood waters of that river used to spread themselves. Those lowlands were separated from the plaintiff's

land by a bank constructed under certain drainage acts, and which protected the plaintiff's lands from floods. By the construction of the defendants' railway without sufficient openings those flood waters could not spread themselves as formerly, and were penned up, and flowed over the bank on the plaintiff's land. *Prima facie*, this would give the plaintiff a cause of action; and the question is whether the company are protected by their act." The court held: "That, although the company were not required by their act to make flood openings to their embankment, and would not be compellable by mandamus to make them, yet, as they might, by proper caution, have prevented the injury sustained by the plaintiff, an action on the case was maintainable against them for such injury." This means that the act of constructing the embankment was not wrongful, because the act of Parliament had authorized it, just as we hold now that the construction of a work of internal improvement authorized by law cannot be enjoined or controlled by the court, but that the company constructing such works is answerable to the landowner for such damages as may result to him, and particularly for damages resulting from negligent or unskillful construction of the work. *Arbenz v. Wheeling, etc., Co.*, 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371; *Mason v. Bridge Co.*, 17 W. Va. 396; *Spencer v. Railroad Co.*, 23 W. Va. 406. By saying that *prima facie* this would give the plaintiff a cause of action, the judge meant that, if the construction of the railroad had not been a public work, authorized by law, it would have been wrongful, and the embankment might have been abated as a nuisance.

These English decisions must be accepted as being declaratory of the common law. They were adopted and approved as correctly announcing the law by the Virginia court prior to the division of the state. The interpretation put upon them by that court must be accorded great weight here, because the Virginia decisions rendered prior to the division of the state are as binding upon this court as its own decisions. The two cases above referred to deal with the flood water of streams, and apply the same principles to it that are applied by the common law to natural water courses themselves. They utterly preclude the assumption that such waters are surface waters, and class them with the waters of natural streams.

In some of the American cases in which ordinary flood waters are held to be waters of the stream, stress seems to be laid upon the fact that the flood waters maintain a current, and do not stand upon the ground as backwater, motionless as a pool. *Lawrence v. Railway Co.* seems clearly not to recognize any such distinction, for in the course of the opinion it is said the flood waters of the river used to spread themselves over the lowlands, just as they do in this country, and that, by the construction of the railway embankment

they were prevented from spreading themselves as they had formerly done, and flowed over the bank onto plaintiff's lands. This imports that by the railroad embankments the waters were confined to smaller limits, and thereby raised to a higher level, so that they overflowed the bank, which had formerly been of sufficient height to protect plaintiff's land. At any rate, they are not referred to as waters flowing over the land outside of the banks of the river and maintaining a current.

The Indiana decisions are clearly at variance with the application of the principles of the common law made by the English cases. They recognize nothing as overflowing river water unless it flows practically all the time. Such waters as are alluded to in *Lawrence v. Railway Co.* and *Rex v. Trafford* as flood waters flowing beyond the limits of the stream are classed as surface waters, although they maintain a current over the land. Thus, in *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114, the court, in its opinion, at pages 172 and 173, 64 Ind., 31 Am. Rep. 114, says: "In the complaint before us there is no averment of any water course, except, indeed, by way of parenthesis, that the place, during floods, is a part of the Ohio river; but the facts averred clearly show that it is not upon the bed of the river, nor within its channel, nor between its banks; in short, that it is no part of a water course, but that the flow is over the entire surface of the land, is occasioned by temporary causes, and is not usually there. The rights of the appellee therefore are such as a proprietor may have in surface water, which, as we have seen, is a part of his land; and the injuries or inconveniences which the appellant is alleged to have suffered are such as arise from the changes, accidents, and vicissitudes of natural causes." The reason for this departure is found in the nature and situation of the lands of that state, for in the same case—which is referred to in subsequent cases as a leading case in that state—the court says: "The doctrine contended for by the appellant, applied to the vast alluvial regions—so generally level, subject to occasional inundations—bordering upon the Ohio river, and lying along other rivers and large streams within this state, would very much embarrass agricultural and general improvement by preventing proprietors of lands from securing their fences by planting trees or other permanent methods, and in some instances, perhaps, render large portions of our richest soil useless. While the owners of lands may not obstruct water courses to the injury of others, they must be permitted to fence and cultivate their fields and improve their lands in the way which best subserves their interests, without being responsible for the accidents of floods or the shiftings of surface water occasioned thereby, although sometimes slight and temporary injuries may result therefrom to adjoining owners. These are accidents, which must be borne alike by all." This

sounds very much like a declaration of state policy, designed to facilitate the cultivation of vast areas of low and swampy lands, subject to frequent overflow, in the interest of the general welfare of the people of those sections of that country and of the whole state; but the situation may fully justify it as a necessary modification.

Though the flow or current of a water course is one of its pronounced characteristics, it is at variance with common knowledge and reason to say that only such water of a stream as is perceptibly moving may be considered a part of it. When one stream, uniting with another, obstructs its flow by reason of its running bank full, while the other is low, and causes such other stream to be filled with back water, can it be said that, so long as the backwater stands, it is only surface water? Are all the motionless pools within the banks of a river, produced by the windings of its channel and current, to be called surface water? Nobody has ever ventured such an unreasonable suggestion. If it be conceded that the running waters of an overflowing river on the lowlands outside of its banks do not cease to be part of the river—as clearly they do not—what reason can be assigned for a distinction outside of the banks which cannot exist within them? The standing waters are supported and maintained by the great body of water forming the river. From bank to bank, surface to bed, within the banks and beyond them, as far as the water stands or flows, all the atoms or parts are, for their positions, interdependent and inseparably united save when absolutely severed. If, from the lowest point in the bed a large quantity should be removed, a subsidence of the entire surface would result, each particle finding a lower level by the law of gravitation. That part of the water which flows is simply seeking what the standing water has already found, its level. By nature, it is all one body, until severed in some way, and the law suggests no reason or principle upon which what clearly is not severed can be deemed to have been cut off. No doubt such water often becomes so separated from the river as to justify its classification as surface water. On the lowlands along our rivers there are depressions having no outlets to the river or elsewhere, and in which, when filled, the water must stand until it passes away by evaporation through the air and percolation through the soil. These are filled by overflow in times of flood, and upon the recession of the river are left full of water. This overflow water is thereby effectually severed from the waters of the river, and no doubt becomes, under the decisions, surface water.

The suggestion that the rules governing the rights of riparian owners in respect to our great rivers should be different from those applicable to the small English streams is a novel one, not expressed by any of the decided cases. Shall they be likened unto the high seas merely because our public policy has classed them as navigable waters beyond

the limits of tide water, while the English streams are not, and because we deny to riparian owners any exclusive right to the bed or shores, inconsistent with the public right of navigation, as a matter of public necessity and convenience in the interest of commerce and the public welfare? If we did so, we would do it for a reason other than that assigned as justification for embanking against the waters of the sea, namely, that their breaking in upon the land is due to unknown causes, and cannot be anticipated. They suddenly come where they have never before been known to occur, and may never be repeated, unlike the floods of inland streams, recurring year after year in obedience to well-known natural laws and causes. Everybody is bound to take notice of them, and as to them no man can be heard to set up his ignorance. The public nature of our natural streams argues the exact contrary of the proposition suggested. Neither by embankment nor other structure can a riparian owner obstruct or alter them to the injury of the public. The sea may be fenced out to the utmost extent of man's ability, and there will still remain ample room for the world's commerce; but a very small obstruction may seriously impair the usefulness of a great river.

The tremendous extent and weight of the overflow of our great rivers makes it all the more necessary to adhere to common-law principles. A diversion of the course of these irresistible bodies of water results in great injury and possible disaster. It is only because of their comparative slightness in quantity and incapacity to do injury that the law allows the owner of land to do as he pleases with the surface waters on them, or that would come upon them. When he collects and forms them into a body, and thus makes them injurious and hurtful, the law prohibits him from turning them upon his neighbor. The clearing away of the forests, by reason of which the streams rise higher and more quickly than when the fallen leaves, moss, and muck held back the waters in the forests, and the draining of the swamps and lowlands, only emphasize this view. Of all these changes persons dealing with the waters of the river must be deemed to have notice, too.

For the foregoing reasons we conclude that the overflow water of a river at times of ordinary flood, whether standing motionless on the adjacent land or sweeping over it, do not cease to be part of the river, unless so separated from it as to prevent its return. From this it follows that by preventing the gradual rise of the water over plaintiff's lot by damming it and raising its level so as to cast it down in the form of a cataract or waterfall upon her grounds, and thus causing injury which would not otherwise have occurred, is such an interference with the stream as, by the common law, gives a right of action; and the same legal result arises from the prevention of the outflow of the water from the basin, in conse-

quence of which it remained upon the land longer than otherwise it would have remained there, unless the flood was extraordinary, an act of God. A larger culvert would have rendered the embankment uninjurious to plaintiff's property in these respects, and the failure to make it of sufficient size to carry the water is negligent construction. Though the defendant could lawfully build the embankment, in doing so it was bound to use the engineering knowledge and skill ordinarily applied in the erection of such works. It must be carefully and skillfully done. *Taylor v. Railroad Co.*, 33 W. Va. 39, 10 S. E. 29. Whether a flood is extraordinary is generally, though not always, it seems, a question of fact for the jury. *Railway Co. v. Gilleland*, 56 Pa. 445, 94 Am. Dec. 98; *Brown v. Railway Co. (Pa.)* 38 Atl. 401. If, therefore, the evidence is such as would warrant a finding that the flood in question was not extraordinary, the demurrer to the evidence cannot be sustained on the theory that it was extraordinary as the demurree is entitled to the benefit of all inferences of fact that may be fairly deduced from the evidence. *Garrett v. Ramsey*, 26 W. Va. 345; *Gunn v. Railroad Co.*, 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575; *Mapel v. John*, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800, 57 Am. St. Rep. 839. According to the evidence the river is subject to frequent rises of varying height and rapidity. That of 1884 was higher than that of 1898. The water had been on a level with the street 10 or 12 times in a period of 50 years. One witness says that of 1898 was an unusual flood, but a jury would not be bound to accept his opinion. The facts attending the rise in question were not shown to have been without precedent as in all cases in which great floods have been classed as acts of God, such as the Johnstown Flood (*Long v. Railroad Co.*, 147 Pa. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. Rep. 732; *Wald v. Railroad Co. [Ill.]* 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332); the flood of 1852 in the Congaree river, the greatest freshet ever known in that country (*Lipford v. Railroad Co.*, 7 Rich. Law [S. C.] 409), or that which submerged Chattanooga in 1867, and broke up all roads leading into it, and as to which the proof showed "beyond question that such a flood had never occurred" at that place "within the memory of man; the old inhabitants who had witnessed other remarkable overflows since 1826, never having seen such a one" (*Railroad Co. v. David*, 6 Heisk. [Tenn.] 261, 19 Am. Rep. 594). The evidence shows variability and irregularity in the rises to which the river is subject, and one much higher than that of 1898 had occurred just about the time the road was built. Unlike the ocean tides, freshets and floods in streams are governed by no fixed rules as to volume or the time in which it gathers, and the facts disclosed by the evidence are not such as would call upon a jury to pronounce the flood extraordinary in character.

Practically all that is urged upon the demurrer to the

Canadian Pac. Ry. Co. v. Elliott

declaration, not disposed of by the general principles already discussed, is that the declaration does not aver that the defendant constructed the embankment, nor the height attained by the water, and the rapidity with which it rose. The amended declaration does aver the building of the embankment by the defendant, and no principle of pleading requiring so much of detail as is suggested by the other objection is referred to. A declaration need not set out evidential facts.

The jury fixed the damages at \$362, of which \$337 is for the cooper shop and contents washed away and \$25 for injury to the surface of the lot. No objection to this finding was made in the trial court by motion to set the verdict aside or otherwise, but the plaintiff in error now insists that the judgment should be reversed because the embankment did not cause the loss of the cooper shop with its contents, the water having been so deep it would have floated away anyhow, and because some of the tools and materials in it were the property of plaintiff's husband, he having purchased them. This is an exception to the action of the jury in assessing the damages, which cannot be made in the appellate court. Only the rulings of the trial court may be reviewed here. Upon the demurrer we can only say whether the evidence sustains plaintiff's right to the damages, for that is all the lower court considered. It was not requested to rule upon the correctness of the finding of the jury as to the quantum of damages. Its action is a prerequisite to the exercise of any jurisdiction by this court. *Riddle v. Core*, 21 W. Va. 530; *State v. Phares*, 24 W. Va. 657; *Brown v. Brown*, 29 W. Va. 777, 2 S. E. 808; *Proudfoot v. Clevenger*, 33 W. Va. 267, 10 S. E. 394; *Humphrey's Adm'r v. West's Adm'rs*, 3 Rand. 516; *Barrett v. Coal Co. (W. Va.)* 47 S. E. 154.

Seeing no error in the judgment, we must affirm it.

CANADIAN PAC. RY. CO. v. ELLIOTT.

(Circuit Court of Appeals, Second Circuit, April 11, 1905.)

[137 Fed. Rep. 904.]

Master and Servant—Railroads—Injuries to Servant—Rules—Failure to Observe—Assumed Risk.*

Where a car repairer failed to observe a reasonable rule requiring a blue flag by day and a blue light by night to be displayed at one or both ends of a car, indicating that workmen were under or about

*As to contributory negligence and assumption of risk where railroad employees fail to comply with rules and instructions, see footnote appended to *Schlemmer v. Buffalo, R. & P. Ry. Co. (Pa.)*, 10 R. R. R. 240, 33 Am. & Eng. R. Cas., N. S., 240; *Carson v. Southern Ry. Co. (S. Car.)*, 12 R. R. R. 337, 35 Am. & Eng. R. Cas., N. S., 337 (disobedience of rules in compliance with instructions of vice principal is not contributory negligence); *McMillan v. Grand Trunk Ry. Co. (C. C. A.)*, 12 R. R. R. 712, 35 Am. & Eng. R. Cas., N. S., 712 (going between cars, in violation of rules or

Canadian Pac. Ry. Co. v. Elliott

it, and providing that, when thus protected, the car shall not be coupled to or moved, etc., and such failure resulted in his death by another car being pushed against the car on which he was working, he assumed the risk.

Same—Customary Violation—Evidence.

Where a car repairer was killed while working about a car which he had failed to protect with a signal, as required by rule providing that a signal should be displayed on one or both ends of a car to indicate that "workmen are under or about it," evidence of a witness that, in case of work being done "under a car," it would be flagged, but that, if the workmen were simply going to step behind the car for "a half a minute or so," they would not flag it, he having been employed prior to the adoption of such rule, and having worked under a rule only requiring cars to be protected in case of necessity for car repairers to work "under the car," was inadmissible to show a customary violation of the later rule.

Same.†

In an action for death of a car repairer while working about the same without having protected it, as required by rule, evidence held insufficient to establish that the rule had become *functus officio* by frequent violation.

In Error to the Circuit Court of the United States for the District of Vermont.

For opinion below, see 129 Fed. 163.

This cause comes here upon writ of error to review a judgment of the Circuit Court, District of Vermont, entered upon the verdict of a jury in favor of defendant in error, who was plaintiff below. The action was brought to recover for the death of a car repairer in the service of the defendant company, who was run over and killed by a car which he was inspecting at Richford Station, Vt.

F. E. Alfred and W. B. C. Stickney, for plaintiff in error.

W. L. Burnop, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. Besides the main line, there are at Richford several sidings, numbered, respectively, 1, 2, etc. A few minutes prior to the accident a through freight train from Montreal had pulled into the yard. It was nec-

orders, to receive instructions, prevented recovery); Illinois Cent. R. Co. v. Jones Adm'r (Ky.), 12 R. R. R. 372, 35 Am. & Eng. R. Cas., N. S., 272 (taking part in flying switch, in violation of rules, but in obedience to order of superior, did not prevent injured brakeman from recovering).

†For the authorities in this series on the subject of the waiver of rules made for the guidance and protection of railroad employees, see Hill v. Boston & M. R. R. (N. H.), 11 R. R. R. 385, 34 Am. & Eng. R. Cas., N. S., 385 (insufficiency of evidence to show failure to enforce rules); St Louis Nat. Stockyards v. Godfrey (Ill.), 7 R. R. R. 28, 30 Am. & Eng. R. Cas., N. S., 28 (waiver of rules intended to regulate the running of trains in switchyards); Wright v. Southern Ry. Co. (Va.), 5 R. R. R. 438, 28 Am. & Eng. R. Cas., N. S., 438 (company chargeable with knowledge of disregard of rules); extensive note appended to Galveston, H. & S. A. Ry. Co. v. Adams (Tex.), 20 Am. & Eng. R. Cas., N. S., 274.

essary to cut some cars out of it. Two cars, which had been in the middle of the freight train, were first sent down siding No. 1 in charge of one Sears as rear brakeman. After they were brought to a standstill, he returned to the train, and five cars located just in front of the caboose were cut out and kicked back on the same siding. Sears rode those also, and they came with great force against the other two cars, driving them back a considerable distance. Deceased and a car inspector, Green, had been examining a freight train which had drawn into the yard on the next siding, No. 2. They had finished that job, and were on their way back to the station to await the next job, when they drew near to the rear of the two cars on siding No. 1. Elliott (the deceased) suggested that they should test the "knuckle"—a part of the coupling—of the rear car. Both of the men thereupon stepped in behind the car, where they would be hidden from the view of any one "riding down" any cars moving towards them on siding No. 1. The testing of the knuckle is an operation very quickly performed, but before they had finished it the five cars struck the two, and, as the latter moved backward under the impact, deceased was knocked down, run over, and killed.

The court left several questions to the jury: First, to determine whether the five cars were properly and prudently controlled in being sent down on the two; second, if they were not so controlled, was that because Sears was not a prudent, proper, efficient, and competent brakeman, such as a prudent man would put in that place? He charged them that the defendant would be liable only if he were short of the proper competency and efficiency as a brakeman; that, if he was a good brakeman, but was at the moment not paying attention, not doing his duty, that would be his fault, and not the fault of the company. The court also left it to the jury to determine whether the deceased was guilty of contributory negligence; to determine what a prudent man would do in view of the whole situation—the rules as they were understood in the yard, the situation of the switch engine and cars up above the highway crossing, the chance deceased had to look and see if the car was coming, and what he had a right to expect as to how much time would be consumed, assuming that the cars would be run down in the usual way. They were to take him as he stood there, knowing the switching crew was where it was, knowing how long it would take to test the knuckle, knowing that his superior was with him, knowing the rule as it was understood in the yard, and to say whether, taking everything into account, he was lacking in prudence in stepping in behind the car to test the knuckle.

These instructions assumed that the testimony would justify the jury in finding that deceased might disregard the rule referred to, speculating on his chances of escaping in-

jury as a consequence of such disregard. The record does not warrant such a finding. For a considerable time prior to August 10, 1901, the company's book of rules and regulations for the guidance of its employees contained the following:

"Rule 14. When necessary for car inspectors to work under a car, they must protect themselves by attaching to the car a red flag by day or a red light by night. The car thus protected must not be coupled to or moved, until the red signal is removed by the car inspector. When a car standing on a siding is protected by a red signal, other cars must not be placed in front of it, so that the red signal will be obscured, without first notifying the car inspector, so that he may protect himself."

This rule was in force down to the time of the adoption of rule 26, on August 10, 1901, when rule 26 became a substitute for and superseded rule 14. Rule 26 is as follows:

"Rule 26. A blue flag by day and a blue light by night, displayed at one or both ends of a car, engine, or train, indicate that workmen are under or about it. When thus protected it must not be coupled to or moved. Workmen will display the blue signals, and the same workmen are alone authorized to remove them. Other cars must not be placed on the same track, so as to intercept the view of the blue signals, without first notifying the workmen."

It is manifest, upon a comparison of the two rules, that the changes introduced by the new are all in the direction of more carefully safeguarding the employees. Engines and trains, as well as cars, may be put under the danger signal. The old rule protected only car inspectors. The new rule covers all workmen, whether their work be inspection or repair. The old rule protected those covered by it only when at work "under a car." The new one protects them when "under or about" a car. Of a rule which required section foremen to carefully flag their truck and hand cars, the Circuit Court of Appeals in the Eighth Circuit, per Caldwell, Circuit Judge, said:

"These rules are reasonable. They are founded on the experience and observation of those who have had the management and operation of railroads from their creation down to the present time. They are essentially for the protection and safety, not only of the property of the company, but of passengers and of the employees of the company, more especially of section foremen and their men. * * * These rules are not incapable of observance; and obedience to them imposes no unnecessary hardship or burden on section foremen or their men, while it protects them from injury. The time of the men required to comply with these rules is the company's. No loss of wages ensues, no matter how much time is taken up in the observance of the rules. It is no loss or hardship to the men, therefore, to require them to obey rules made in great measure for their own protection.

* * * Their nonobservance contributed to, if it did not occasion, the accident. The section foreman was clearly guilty of contributory negligence, which precludes a recovery in this case." *Kansas & A. V. R. Co. v. Dye*, 70 Fed. 24, 16 C. C. A. 604.

"A company being under a duty to make reasonable rules, it needs hardly be said that there no longer exists any question of its right and power to do so; and that a servant, accepting employment with knowledge of such rules, and especially when his attention is directed thereto, is under obligation to fully conform to such rules when and so long as they are really maintained in force, and that a servant or employee failing or refusing to observe such rules takes upon himself the risk of the consequences of such disobedience, and is, as matter of law, guilty of negligence, which defeats his right to hold the master liable for an injury of which such negligence is the proximate cause." *C. C. A., Sixth Circuit, Lake Erie & W. R. R. v. Craig*, 80 Fed. 488, 25 C. C. A. 585.

See, also, *C. C. A., Fourth Circuit, Richmond & D. R. Co. v. Finley*, 63 Fed. 228, 12 C. C. A. 595; *C. C. A., Eighth Circuit, per Brewer, Circuit Justice, Atchison, T. & S. F. R. v. Reesman*, 60 Fed. 370, 9 C. C. A. 20, 23 L. R. A. 768.

In the case at bar the failure to display the blue flag at the end of the car nearest to the shunting train must be held to have contributed to the accident. No one can say that, with that danger signal in view, either the conductor who cut them out or Sears, the trainman who rode them down, would nevertheless have brought them into violent contact with the cars thus protected. That deceased knew of the rule is indisputable. He had been working as car inspector for several years, and is chargeable with knowledge of the rules contained in the book furnished to him for his guidance. One of plaintiff's witnesses, Green, the car inspector who, in conjunction with deceased, had just finished the inspection of the train on siding No. 2, testified that Elliott had knowledge of the rules because he had heard him talk about them; that he and Elliott knew of the change of rule, because they had blue signals, instead of red; that he had heard Darrow, foreman of the yard, give Elliott instructions in reference to following rule 26, telling him that, "if we went to do anything about a car, to be sure and protect ourselves; if we did anything about a car without protecting ourselves we did it at our risk"; that he had heard Elliott himself give these same instructions to other workmen. Darrow, the foreman, also called for the plaintiff, testified that he had given Elliott those instructions upon an occasion when he had omitted to do something. That the rule was wholly disregarded on the occasion in question is conceded. No blue flag was displayed. Green testified that they both stepped in behind the car upon Elliott's suggestion that they test the knuckle, and that no

flag was put upon the car, because the test would be but 10 or 15 seconds' work, and he did not bother with it.

Although an employer may prescribe a printed rule for his workmen to follow, he may nevertheless abrogate or waive it, otherwise than in print. He may knowingly tolerate such a wide spread and continuous disobedience to its terms as to make it a dead letter. "To hold that defendant company could make this rule on paper, call it to plaintiff's attention, and give him written notice that he must obey it and be bound by it on one day, and know and acquiesce without complaint or objection in the complete disregard of it by the plaintiff and all its other employees associated with him on every day he was in its service, and then escape liability to him for an injury caused by its own breach of duty towards the plaintiff because he disregarded this rule, would be neither good morals nor good law." *Northern Pac. R. Co. v. Nickels* (C. C. A., Eighth Circuit) 50 Fed. 718, 1 C. C. A. 625. See, also, *Lake Erie & W. R. v. Craig* (C. C. A., Sixth Circuit) 80 Fed. 488, 25 C. C. A. 585; *Whittaker v. D. & H. Co.*, 126 N. Y. 544, 27 N. E. 1042. In one of these cases it appeared that none of the employees, so far as the knowledge of the witnesses (who were all brakemen and affected by the rule) went, ever obeyed the rule; that at the place where the accident happened they constantly violated it; and that the division superintendent, whose office was located there, had frequently seen them violate it and made no complaint or objection. In another, the rule was not generally observed in the yard where the accident happened, and these violations of the rule were known to the division superintendent and the yardmaster; the former admitting upon the stand that the rule was not always observed. In another case the engineer and others, for a period of at least one year, had been in the habit of disobeying a rule which forbade their placing their engines on the main track and leaving them there while waiting orders. Where, however, it was testified that it was customary for switchmen to violate a rule, but there was no evidence to show that the custom was known to the officers of the company, a different conclusion was reached. *Gleason v. Detroit, G. H. & M. Ry.* (C. C. A., Sixth Circuit) 73 Fed. 647, 19 C. C. A. 636. See, also, *Atchison, T. & S. F. R. v. Reesman*, *supra*. That the evidence in the case at bar falls far short of what has been held sufficient, in such reported cases as we are referred to or have been able to find, to warrant a finding that an express rule of the company has been abrogated or has become a dead letter, will be evident from the following analysis of the testimony:

On this branch of the case, the first witness called by the plaintiff was Whitman, who had been employed as a car repairer in the Richford yard in the winter of 1888-89, many years before the adoption of rule 26. He testified that, "in case we were going to do any work under a car, we would

flag it; but, if we were going to step behind a car for half a minute or so, we wouldn't." This testimony was duly objected to and exception was reserved. It was error to admit it, because it was in no way competent to show practical construction or disobedience of a rule which provided for signaling the doing of work "about a car" by proof of what was done under a rule which was applicable only when the person doing the work was "under the car." And we are not satisfied that the error was harmless. Much more of the same sort of evidence was admitted, but the jury did not have their attention called to the difference between the two rules, nor to the necessity of confining their attention to what was done under the later one. It is a reasonable inference that they understood that the entire body of evidence as to putting danger signals on cars was to be considered by them in determining whether rule 26 had been so uniformly and continuously disregarded in the Richford yard as to warrant a conclusion that the officers of the road acquiesced in its violation.

Plaintiff's next witness was Green, deceased's fellow car inspector, above referred to. He testified that if they went to do anything about a car, except walking along beside a train that had come in, looking things over, it was the practice and custom to place a flag on the car, even if the job were only to test a knuckle, ten or fifteen seconds' work. "It was our custom," he said, "to put a flag up for five seconds' work." Asked why it was not done this time, he said: "I couldn't tell you why we didn't do it; but we didn't do it." Asked if he ever did it, he said: "Sure we did; sure, yes, sir." Later on, when pressed by counsel, he admitted that two or three times before he might have stepped in to test a knuckle without using the flag, "calculating to protect himself."

Plaintiff's next witness was Braman, who had worked in the yard as a car repairer. He testified that they never used the flags if they were inspecting a car, or simply looking over a car; only used them when working under a car. But the witness stated that his employment of six years or so was somewhere along in 1890, and that he worked only under the old rule 14, and did not have the new rule 26 in his time.

Plaintiff's next witness was Currier, a laboring man, not at the time of the trial employed by the company. He had worked for them as a car repairer. His testimony is very unsatisfactory. On the direct he testified that he had tested himself, and seen many knuckles tested, and never put up a flag, nor knew of one being put up, for knuckle testing; that he never saw a book of rules; he could not read or write. On cross-examination he admitted that from the instructions he received he would feel obliged to use a flag if he was required to go behind a car when a shunting engine was at work. His last service with the company was

a year and a half before the trial. This would bring it no further back than August 23, 1902, subsequent to the accident. His other term of service with the company was six years before the trial, which would be in 1898, a considerable time before the rule was changed. There is nothing to show that his narrative deals with operations conducted under rule 26, prior to the accident.

Plaintiff's next witness was Darrow, the yard foreman. He described the method of inspecting a train which has just hauled in, two inspectors commencing at one end of the train and walking alongside of it, one on each side—the same operation which Green described as looking things over, reporting anything they see wrong to the engineer—and testified that in inspecting a train in that way, it was not customary to put up a flag. Further on he testified that the instructions were to use the flags on cars "when doing anything about them, inspecting them, or putting bolts into them, or anything about the car that was in the shape of repair.

* * * When they are inspecting, they usually have occasions to repair, and it is necessary to have their flags on them while they are under inspection." He added that he had himself given such instructions to Elliott, and concluded his testimony with the statement that it was the custom and the practice in that yard to put a flag on a car standing alone, when all there was to be done was to test a knuckle. Asked if this was the invariable custom, he said, "I want to make the exceptions that I caught them once in a while not doing it," on which occasions he reprimanded them and renewed his instructions to them.

Plaintiff's last witness was Martin, who had been a brakeman, and had acted as conductor in the yard several times. Apparently he had never been a car repairer nor a car inspector. He testified that he had often seen knuckles tested, and that he did not know of the flag ever being used in simply testing the knuckle of a car; that he had seen knuckles tested without using flags, "I presume hundreds of times; that is, in my last six or seven years—eight years, something like that." He was in the service of the company 17 or 18 years, and his employment terminated July 4, 1902, not quite a year after the new rule 26 had superseded the old one. Of these "hundreds of times" he makes no discrimination between those which occurred under the old rule and those under the new. His answer would be truthful, although as matter of fact he had not observed more than a half dozen knuckle inspections during his last year of service. His duties did not require him to inspect or repair, or to oversee inspection or repairs. He was a casual observer only, the dates of whose observations were not so specified in the proof as to make them helpful to a conclusion.

No other witnesses to this branch of the case were called by plaintiff, and nothing on this subject was developed from

Lassiter v. Raleigh & G. R. Co

defendant's witnesses. In our opinion there was not sufficient testimony to take the case to the jury on any theory that rule 26 had been waived by the company, or had been so frequently disobeyed, without effort to enforce it, as to have become a dead letter, which the deceased could disregard without assuming the risk resulting from his disobedience of its provisions. The court should have granted defendant's motion to direct a verdict in its favor on the ground that "plaintiff's intestate was acting, at the time of the injury complained of, in disobedience of the rules and instructions of the defendant, which disobedience directly contributed to the injury complained of."

The judgment is reversed, and cause remanded for a new trial.

LASSITER v. RALEIGH & G. R. CO. et al.

(Supreme Court of North Carolina, Dec. 6, 1904.)

[49 S. E. Rep. 93.]

Master and Servant—Death of Servant—Last Clear Chance—Construction of Statute.

Priv. Laws 1897, p. 83, c. 56, § 1, provides that the personal representative of any employee who shall have suffered death in the course of his services with any railroad company operating in the state by the negligence of any other employee or by any defect in the machinery, ways, or appliances, shall be entitled to maintain an action against the company. Section 2 provides that any contract or agreement, express or implied, made by any such employee, to waive the benefit of that law shall be void: *held*, that the question whether, notwithstanding the contributory negligence of such employee, in an action for his death, the defendant had the last clear chance to avoid the injury, and would have done so by the exercise of proper care, is not taken from the jury merely because of a rule of the company, in a book for which the employee had receipted, providing that, "when a train is being pushed by an engine (except when shifting and making up trains in yards) a flag-man must be stationed in a conspicuous position on the front of the leading car to immediately signal the engineer in case of danger"; the parenthetical expression contained in the rule falling within the inhibition of the statute.

Appeal from Superior Court, Wake County; Bryan, Judge.

Action by Albert Lassiter, administrator of the estate of A. C. Lassiter, deceased against the Raleigh & Gaston Railroad Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

For former opinion, see 45 S. E. 570.

Day & Bell, T. B. Womack, and Murray Allen, for appellants.

Battle & Mordecai and N. Y. Gulley, for appellee.

CLARK, C. J. This case was before this court, 133 N. C. 244, 45 S. E. 570. The defendant appellant says in its brief that "the facts developed by the plaintiff's testimony on the second trial do not differ materially from those on the former

trial," but adds that the defendant had put in evidence rule 404 of the rulebook (for which book plaintiff's intestate had receipted), which reads as follows: "When a train is being pushed by an engine (except when shifting and making up trains in yards) a flagman must be stationed in a conspicuous position on the front of the leading car to immediately signal the engineer in case of danger." The first exception for refusal to dismiss at the close of the plaintiff's testimony was waived by the introduction of evidence by the defendant (*Prevatt v. Harrelson*, 132 N. C. 251, 43 S. E. 800; *Jones v. Warren*, 134 N. C. 392, 46 S. E. 740), and, besides, is settled by the former decision in this case.

The second exception is to the admission of evidence that greater care must be exercised in moving cars in a large town than in a small one. This is so held in *Arrowood v. Railroad*, 126 N. C. 631, 36 S. E. 151, and even if it had been error, it would be harmless error. This was not a yard off to one side of the town, but it was a side track in the main street of the town, and the town ordinance forbidding a higher rate of speed than six or eight miles was proved.

The third exception—for refusal to nonsuit at the close of all the evidence—was properly refused upon the former ruling in this case. Any conflict created by the defendant's evidence was a matter for the jury.

The fourth exception merely raised the same point by asking the court to instruct the jury that upon the whole evidence the plaintiff could not recover.

The fifth exception is without merit, for the court, in its charge, did instruct the jury, as asked, that the plaintiff's intestate, in any aspect of the evidence, was guilty of contributory negligence, and the jury so found. Whether this did not conflict with what was said in *Smith v. Railroad*, 132 N. C. 824-827, 44 S. E. 663, is not before us on this appeal by the defendant.

Exceptions 6, 7, 8, 9, 13, and 16 depend upon the effect of rule 404, and present really the only question in this appeal, the others having been decided on the former appeal. This rule can affect the right to recover only upon the assumption that it was a contract by the deceased, by implication, that, "when shifting and making up trains in yards a flagman need not be stationed in a conspicuous position on the front of the leading car to immediately signal the engineer in case of danger." If the intestate had entered into an express stipulation to that effect, it would have been void. *Priv. Laws* 1897, p. 83, c. 56; *Coley v. Railroad*, 128 N. C. 537, 39 S. E. 43, 57 L. R. A. 817; *Mott v. Railroad*, 131 N. C. 234, 42 S. E. 601; *Sigman v. Railroad*, 135 N. C. 184, 47 S. E. 420. Whether or not, notwithstanding the contributory negligence of the plaintiff's intestate, the defendant had the "last clear chance" to avoid the injury, and would have done so by the exercise of proper care, was a question of fact properly submitted to the

Wellsburg, etc., R. Co. v. Panhandle Traction Co

jury. The plaintiff was not, as defendant contends, barred of the right to have that question submitted to the jury by reason of rule 404.

Exceptions 10, 11, 12, 14, 15, 17, and 20 were settled by the former decision in this case.

Exception 18 is to the usual charge as to the "last clear chance," which was given in accordance with what was held in the former appeal, 133 N. C., near bottom of page 247, 45 S. E. 571.

Exception 21 is to a charge in favor of the defendant. The appeal substantially presents the proposition that the court should have told the jury, as a proposition of law, that it was not negligence in the defendant, as to an employee, not to have some one stationed in a conspicuous place on the front of the leading car to immediately signal the engineer in case of danger, when shifting cars backwards on the side track in Henderson. The court submitted to the jury the question whether there was negligence of the defendant in that respect upon the facts of this case, and whether, notwithstanding the contributory negligence of the plaintiff's intestate, such negligence of the defendant (if the jury found it to be negligence) was the proximate cause of the death of the plaintiff's intestate. In this there was no error of which the defendant could complain. *Smith v. Railroad*, 132 N. C., and cases cited at pages 824-827, 44 S. E. 663. A case exactly in point upon almost identical facts is *Railroad v. Boisseau*, 32 Can. 424.

No error.

WELLSBURG & S. L. R. CO. v. PANHANDLE TRACTION CO. et al.

(Supreme Court of Appeals of West Virginia, Sept. 12, 1904.)

[48 S. E. Rep. 746.]

Eminent Domain—Crossing over Another Railroad.

The acquisition of a crossing by one railroad over another involves a taking of private property for public use.

Same—Same—Jurisdiction.

Section 11 of chapter 52 of the Code of 1899 does not confer upon courts of equity jurisdiction to condemn the property of one railroad, turnpike, or canal company for the purpose of a crossing by another railroad, turnpike, or canal company.

Same—Same—Same.

By said section such courts are empowered to determine the exact places at which, and the manner in which, such crossings may be made, when the parties are unable to agree; but the right to cross must be obtained by proper proceedings under chapter 42 of said Code, when it cannot be secured by consent and agreement of parties.

Same—Same—Same—Character of Crossing.

The place and character of the crossing to be decreed, when the parties fail to agree, are determined by the situation of the parties, the public interests, the topography of the place, the connections to be made, the expense of making the crossing, and all the material facts and circumstances affecting the public and the rights of the parties.

Wellsburg, etc., R. Co. *v.* Panhandle Traction Co

immediately concerned, and not upon the choice and will of the parties desiring it. Hence the court may decree a crossing other than the one described in the bill.

Grade Crossings—Statute—Jurisdiction.

Railroad crossings at grade are neither prohibited nor discriminated against by the statute. On the contrary, they are expressly authorized, and, when the parties fail to agree, the court may order such crossing to be made, as, under all the circumstances, is fair, just, and reasonable, viewed from the standpoint of the parties interested, and promotive of the public welfare.

Same—Same.

The clause in section 11 of chapter 52 of the Code reading as follows, "Provided its work be so constructed as not to impede the passage or transportation of persons or property along the same," neither contemplates nor prohibits such impediments as are merely incidental to a properly constructed crossing at grade.

Same—Right to Construct—Conditions and Limitations.

Wherever a crossing is necessary in the construction of a railroad, the law allows it, and confers the right to obtain it; but this power is to be exercised, in the absence of an agreement by the parties, under such conditions and limitations as to the place and mode of crossing as a court of equity may justly impose, in view of the interests of the parties and the public.

Statutes—Construction.

In the construction of a statute, its spirit, rather than its letter, is the guiding star, but contradiction and repugnance must be avoided when it is possible to do so. The statute must be construed as a whole, and every word in it made effective, if possible.

Same—Same.

A clearly expressed intention in one part of a statute does not yield to a doubtful construction of another portion of it; and when the general intention of the Legislature is clear, and the spirit and purpose of the statute are manifest, a mere implication or inference of a contrary particular or special intent, arising out of language of doubtful meaning, must yield to the general intent.

Same—Same.

Where the language of a statute is ambiguous or the meaning doubtful, the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy, may be resorted to in seeking its true meaning and purpose.

Same—Same.

An undeviating course of legislation in a certain direction through a long period of time, in an effort to systematize and perfect the law relating to a given subject, strongly emphasizes the express language embodying the final declaration of legislative will.

Same—Same.

All former statutes on the same subject, whether repealed or unrepealed, may be considered in construing provisions that remain in force.

Equity—Bill.

Uniting a purely legal demand with an equitable demand, in a bill seeking the enforcement of the latter, does not render the bill multifarious.

Same—Same.

In such case the allegations respecting the legal demand may be treated as surplusage and ignored.

Same—Same.

The extent to which facts must be set out in a bill depends upon the nature of the principal facts to be established. When a general term used has a double meaning, and, standing alone, may import either a mere fact or a conclusion of law, it must be accompanied by a state-

Wellsburg, etc., R. Co. v. Panhandle Traction Co

ment of such additional facts as constitute ground for the legal conclusion which the plaintiff undertakes to establish; else the rule that pleadings must be certain to a common intent is violated.

Same—Same.

Bills filed under section 11 of chapter 52 of the Code of 1899 are governed by the ordinary rules of equity pleading applicable to bills in general, and a bill so filed is sufficient if it so states the plaintiff's case as to inform the defendant of what he is called upon to meet.

Character of Crossing—Costs.

When, in a suit under section 11 of chapter 52 of the Code of 1899, the court decrees a crossing substantially different from the one demanded of the defendant before the institution of the suit, a decree for costs against the plaintiff is proper.

(Syllabus by the Court.)

Appeal from Circuit Court, Brooke County; H. C. Hervey and Thayer Melvin, Judges.

Bill by the Wellsburg & State Line Railroad Company against the Panhandle Traction Company and others. Decree for plaintiff, and defendants appeal. Affirmed.

Henry M. Russel, for appellants.

J. J. Coniff and John P. Arbenz, for appellee.

POFFENBARGER, P. The Panhandle Traction Company, chartered under the laws of this state as a railroad corporation, and operating an electric railway about 16 miles long between the city of Wheeling, in Ohio county, and the city of Wellsburg, in Brooke county, seeks relief from a decree pronounced against it by the circuit court of the latter county in a suit brought under section 11 of chapter 52 of the Code of 1899 by the Wellsburg & State Line Railroad Company, another railroad corporation of this state, organized for the purpose of constructing and operating a steam railroad, to commence, according to the terms of its certificate of incorporation, "at or near the county of Brooke in said state of West Virginia; and run thence by the most practicable route to a point at or near the Pennsylvania state line, at Dunsford in the county of Washington, in the state of Pennsylvania," authorizing a crossing at grade of the said electric railway line by the said steam railroad line on payment of such damages as shall be ascertained by a condemnation proceeding under the provisions of chapter 42 of said Code. If the status of the Wellsburg & State Line Company is such as confers upon it the right to cross the track of another railroad—an inquiry which will be deferred for the present—the relation of the two roads to each other is such as to render a crossing at or near the point designated in the decree proper and highly necessary to effectuate the declared purposes of said corporation. If built as proposed, its line will run—reversing the description in the certificate—from Dunsford, in a westerly course, to the Pittsburg, Wheeling & Kentucky Railroad at the Ohio river, crossing the line of the Panhandle Traction Company in order to make the connection with the Pittsburg, Wheeling & Kentucky Railroad. Without a cross-

ing at some point, the connection cannot be effected, as the Pittsburgh, Wheeling & Kentucky Road lies between the Panhandle Traction Company Road and the Ohio river from Wheeling to Wellsburg. Upon a railroad company so situated, the statute confers the right to a crossing, and provides for its enforcement. It says: "If any railroad, turnpike or canal company shall deem it necessary in the construction of their work, or any branch or siding thereof, to cross any other railroad, turnpike, or canal, or any state or county road, at grade or otherwise, it may do so," etc.; and, further, that, "in case the parties interested fail to agree upon such crossing, * * * the company desiring it may bring its suit in equity," etc. The defense, based upon grounds not in conflict with these views, is raised in part by a demurrer in writing, specifying four principal causes, three of which deny the sufficiency of the bill, viewed as one, invoking the power of eminent domain to take from the defendant company part of its property, and the remaining one its sufficiency as a bill seeking merely a crossing of one railroad by another. Dealing with the bill from the first point of view, the demurrer says the property asked for cannot be taken, because it is already devoted to a public use from which it cannot be diverted for another similar use of no higher nature than that for which it was originally acquired, because the bill does not aver that the property demanded is unnecessary for the enjoyment and exercise by the defendant of its franchise, and because there is no specific averment that the plaintiff will devote that property to a public use. Viewing the bill as one filed under the statute to obtain a crossing, the lack of such particularity in the description of the proposed crossing as will show how it will affect the defendant company's railway, and failure to show impracticability of crossing otherwise than at grade, are assigned by counsel for the defendant as grounds of demurrer.

A clear understanding of the nature of the right desired by the plaintiff will facilitate the disposition of the questions raised by the demurrer, including the supposed distinction between a bill for the taking of private property for public use and one seeking a mere crossing. That a crossing of the right of way and track of one railroad company by the track of another amounts, at least, to the acquisition of an easement by the latter over property owned by the former, is so manifest as to render discussion or citation of authority to that effect useless. However, it has been, in effect, so decided in *Tuckahoe Canal Co. v. Tuckahoe & James River R. R. Co.*, 11 Leigh, 42, 36 Am. Dec. 374. In that case Judge Tucker makes it clear that the property owned by an internal improvement company, and used by it in the exercise of its franchise, is not the franchise itself, but is, on the contrary, private property subject to the *jus publicum*. Whether, in

obtaining such crossing, the ownership of the fee is affected or disturbed, does not enter into this inquiry. The acquisition of a right of way only over the property of another is the taking from that other of a thing of value—a valuable right to the use of the land for certain purposes—and it can be done without the consent of the owner only in the manner and upon the terms prescribed by law. In the case above referred to, the celebrated jurist who delivered the opinion of the court said: "The Tuckahoe Railroad Company set up a pretension to run their road across the canal on a bridge of a certain elevation. They are not content with passing on side by side with their rival, but they assert a right by their charter to cross his line of improvement. This brings us to the inquiry, how far the legislative power is adequate to the grant of such a right?" After discussing the question at considerable length, he expressed his conclusion as follows: "I think it was competent to the Legislature to empower the railroad company to cross the line of the canal, whether the canal company be regarded as the proprietors of the soil, or of a mere right of way. If they are proprietors of the soil, then they hold it by the same tenure that every man holds his land; that is, subject to the *jus publicum*. If it is a mere right of way to which they have title, the argument applies with yet more force, since the power to condemn the land itself is greater than that of condemning an easement upon it."

From this application of legal principles, as well as the obvious nature of the right desired by the plaintiff in respect to the property of the defendant, it is apparent that the former contemplates the taking of private property for public use under the power of eminent domain. But can that power be invoked in a court of equity? What is the function of the suit in equity authorized by the statute? The language of the statute itself seems to fully answer these questions. It says: "In case the parties interested fail to agree upon such crossing or alteration as is desired, the company desiring it may bring its suit in equity, and in such suit the court may, in a proper case, decree that such, or any proper crossing or alteration may be made, upon payment of damages, to be ascertained as provided in chapter forty-two of the Code, and the company desiring such crossing or alteration may thereupon proceed under said chapter to obtain the right to make such crossing or alteration." The power of condemnation is legislative, not judicial, and exists in the courts only by express authorization, and only to such an extent as it has been expressly vested in them. The statute above quoted prescribes the decree to be entered, and stops short of giving the right of occupation of the crossing. It expressly says "the right to make the crossing" may be obtained in another proceeding, and that is in a court of law, where the right to have a jury ascertain the amount of compensation may be de-

manded. Property cannot be taken until just compensation therefor is paid or secured to be paid. Before payment it must be ascertained in such manner as is prescribed by law. Const. art. 3, § 9. Chapter 42 of the Code prescribes the manner, and it authorizes proceedings in the law courts only. There is no jurisdiction in equity to ascertain and decree compensation for damages to property. *Ohio River Ry. Co. v. Gibens*, 35 W. Va. 57, 12 S. E. 1093; *Ward v. O. R. R. Co.*, 35 W. Va. 481, 14 S. E. 142. Equity has jurisdiction to prevent the construction of a work of internal improvement, where it would work such injury to private property, not actually taken, as virtually destroys its value, until compensation for the injury is paid or secured to be paid, and in such case an issue out of chancery will be directed to ascertain the amount of compensation. *Mason v. Bridge Co.*, 17 W. Va. 396; *Teter v. W. Va. Cent. & Pa. R. Co.*, 35 W. Va. 433, 14 S. E. 146; *Ward v. O. R. R. Co.*, 35 W. Va. 481, 14 S. E. 142. Of course, equity would restrain an internal improvement company from actually taking property without having paid, or secured payment of compensation therefor, but whether in that case it would direct an issue out of chancery to determine the compensation to be paid has not been decided by this court. But even if that could be done, there is no shadow of jurisdiction in equity to entertain such a proceeding as is prescribed by chapter 42 of the Code, the only one by which an internal improvement corporation may obtain private property for public use.

Reference to the history of the section under consideration, and railroad legislation in general, will tend to enlighten as to the legislative purpose in authorizing the suit in equity. Under the first general railroad act, which was passed March 11, 1837, railroad companies had authority to enter upon and take land and crossings necessary to the construction of their lines before ascertainment or payment of the purchase money, and courts were prohibited from enjoining them unless it was "manifest that they, their officers, agents or servants," were "transcending the authority given them by" that "act, and that the interposition of a court of equity" was "necessary to prevent injury that" could not "be adequately compensated in damages." In that act the basis of what is now section 11 of chapter 52 of the Code was embodied, but without any restriction upon the making of the crossing before payment of compensation. It was under that act that the case of *Tuckahoe Canal Co. v. Tuckahoe & James River R. Co.*, cited, arose, and on this point Judge Tucker said: "It seemed to be considered by the counsel that the condemnation must precede the execution of the work. This is, I conceive, a misconception of the law. The company have a right to proceed with their work before condemnation." In the Code of 1849 the section, as amended, reads thus: "If any railroad, turnpike or canal company

deem it necessary in the construction of their work to cross any other railroad, turnpike, or canal, or any state or county road, it may do so, provided its work be so constructed as not to impede the passage or transportation of persons or property along the same. If any such company desire that the course of any other railroad, turnpike, canal, or state road should be altered to avoid the necessity of any crossing, or of frequent crossings, or to facilitate the crossing thereof, the alteration may be made in such manner as may be agreed between the company desiring such alteration, and the other railroad, turnpike or canal company, or the board of public works in the case of a state road. And if such construction or alteration as is allowed by this section shall cause damage to any company, or to the owner of any lands, the railroad, turnpike or canal company first mentioned shall pay such damage. But any county road may be altered by any such company for the purpose aforesaid, whenever it shall have made an equally convenient road in lieu thereof." Code 1849, c. 56, § 24. It remained in this form in the Codes of 1860 and 1868. Whether the insertion of the clause providing for agreement as to the manner of crossing made it necessary to condemn before crossing, when the parties failed to agree, was never decided. For such contingency the statute made no express provision. The Constitution of 1863 did not require payment, or security for payment, of compensation for private property taken for public use, before the taking of it. But the Constitution of 1872 does, and this section concerning crossings and other statutes have been amended so as to conform to this new constitutional limitation. The act approved April 3, 1873, providing for the incorporation and regulation of railroad companies, although somewhat indefinite, seems to be in conformity with the constitutional provision. But the act of March 10, 1881, amending and re-enacting the section here involved, with others of chapter 52 of the Code, removed all doubt, if there was any, and made the legislative intent clear, by expressly saying that in case of disagreement the right to cross shall be obtained by condemnation under the general law of governing condemnation proceedings, after having obtained by decree in equity a designation of the place at which, and specification of the manner in which, the crossing desired shall be made. The statute as it now stands is an expression of legislative will, and a legislative interpretation of section 9 of article 3 of the Constitution, to the foregoing effect. It says the taking of a crossing is a taking of private property, for which the proceeding must be under chapter 42, and not under this section, except to the extent of determining where and how the crossing shall be made.

In view of this conclusion, it is immaterial whether the allegations of the bill purporting to set up a demand for a decree for actual possession and use of the crossing are such

as would constitute a sufficient application under chapter 42 of the Code or not, for the granting of the relief to be obtained under that chapter is not within the jurisdiction of a court of equity, and that court will not inquire into the matter of their sufficiency. It will in no sense take cognizance of that sort of a case. For the same reason, these allegations do not make the bill multifarious. "The uniting of a purely legal demand in a bill which seeks the enforcement of an equitable demand will not render the bill liable to be dismissed as multifarious." *Smith v. Patton*, 12 W. Va. 541; *Smith v. McLain*, 11 W. Va. 654; *Pyles v. Furniture Co.*, 30 W. Va. 123, 2 S. E. 909. In so far as these allegations were not essential or proper in a bill to settle differences as to where and how a crossing shall be made, it was proper to disregard them as surplusage.

The bill designates the point at which the crossing is desired, and the necessity of such crossing, and shows such necessity by facts alleged. It also avers that the construction of plaintiff's road across that of the defendant company will not impede the passage or transportation of persons or property along the latter road. Must it go further, and show just how it will affect the track of the defendant company, and that an undergrade or overgrade crossing is impracticable? The statute confers the right to cross "at grade or otherwise" when necessary and possible without impeding passage and transportation, and provides a remedy for the enforcement of the right when withheld. Want of necessity, impracticability of effecting any crossing, or the impropriety of crossing at a point or in a manner specified, are all matters of defense, and substantially covered by the allegations of the bill. In other words, the interposition of any one of them is possible only by denial of some material averment of the bill. Tested by the general rules and principles of equity pleading, the bill seems to be sufficient. A bill need not set out the evidential facts necessary to sustain its general allegations. The extent to which facts must be detailed depends upon the nature of the main fact to be set up. When the general term used for it may be equivocal and stand for a simple fact or a conclusion of law—as, for instance, the word "fraud"—the rule of "certainty to common intent" demands the statement of sufficient facts to show that the acts complained of, and intended to be established by the evidence, constitute fraud, but even here the evidence need not be detailed. All facts necessary to constitute a foundation for the legal conclusion that the plaintiff is entitled to the relief he desires must be alleged, but conclusions of law alone are insufficient, and violative of the rule of certainty in pleading. *Billingsley v. Menear*, 44 W. Va. 651, 30 S. E. 61; *Vance Shoe Co. v. Haight*, 41 W. Va. 275, 23 S. E. 553; *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611; *Pyles v. Furniture Co.*, 30 W. Va. 123, 2 S. E. 909; *Newberger v. Wells*, 51

Wellsburg, etc., R. Co. v. Panhandle Traction Co

W. Va. 624, 639, 42 S. E. 625. All the essential facts here are of such character as to require no great degree of particularity and minuteness of statement in giving the bill the prescribed degree of certainty. Whether the crossing is necessary and practicable is a matter of almost pure fact, dependent upon the evidence, and involving scarcely any application of the principles of law in its determination. The simple demand of a crossing at a given place, with a general specification of the kind of crossing desired, preceded by the necessary averments of the character of the plaintiff and necessity of the crossing, would seem to be sufficient to apprise the defendant of everything that can be involved in any issue that can be made up between the parties. In order to fulfill the requirements of the rule, the plaintiff need only so state his case "as to inform the defendant of what he is called upon to meet." Zell Guano Co. v. Heatherly, 38 W. Va. 409, 18 S. E. 611. We think the demurrer was properly overruled.

The answer denies the right claimed by the bill on the ground that the plaintiff is not, and will not be when completed, a common carrier, but a mere private coal road. To sustain this position, the defendant relies upon the shortness of plaintiff's line; its failure to make connection with any railroad except the Pittsburg, Wheeling & Kentucky at the Ohio river; the fact that the Wellsburg Coal Company, a corporation having for its stockholders the same persons who own the stock of the plaintiff railroad company, owns 1,000 acres of coal land through which the railroad will be constructed and operated; and the admission of the vice president and chief engineer of the plaintiff that the principal object in constructing the road is to provide means for transporting the coal from the Wellsburg Coal Company's land. It further appears from the testimony of this witness, however, that the stockholders of the plaintiff intend to obtain a charter under the laws of Pennsylvania, and extend the road from the state line to Tylerdale, near Washington, Pa., where connection will be made at the east end of the line with the Baltimore & Ohio and other railroads; that the entire length of the road, so extended, will be 28 miles; that the road has been graded and rails laid for a distance of 3 miles, commencing at the west end, and rights of way acquired for some distance beyond the grading towards the state line; that the road will be equipped with cars and coaches for the general transportation of freight and passengers; and that the road will be in all respects a common carrier. This evidence is uncontradicted, and nothing tends towards its overthrow except the circumstances of ownership by the stockholders, by means of corporate organization, of the coal land, and its being the principal inducement to the investment in the railroad company. But they do not exclude the intent to operate a railroad as a common carrier. The several purposes of the corporators may consistently

stand together. Other motives than the mere operation of a common carrier and other works of internal improvement always move the people who build them, else none would ever be constructed. They constitute fields of profitable investment, direct and indirect, and have a double character, which the law recognizes and upholds. For some purposes they are private, and for others public, and the private right which the stockholders and creditors have in respect to them constitute the sole inducement to their construction and operation. For the purposes of this case, it suffices to say the evidence relies upon in support of this defense is insufficient to sustain it.

Another defense raised by the answer rests upon a view of the statute which, if adopted here, would reverse the decree. It is that the letter of the statute must be observed, and no crossing can be allowed that will in any manner or to any extent "impede the passage or transportation of persons or property along" the road over which a crossing is sought. If this is a correct interpretation, there can be no crossing at grade, except by consent, under any circumstances, however imperious the necessity may be, for every such crossing is an impediment, in a certain sense. In the language of counsel for the appellant: "The necessity to stop the defendant's cars when a train might be upon the crossing or approaching the crossing, would be an impediment. The necessity to reduce the speed of the cars and to wait for a signal from the watchman would be an impediment. The constant danger of accidents would be a most serious interference with the defendant's operations." Thus adherence to the letter of the proviso found in the section under consideration would defeat, in part, the very right which the Legislature has plainly attempted to confer by the express language of one part of the section—the crossing of one railroad by another at grade. The section must be taken as a whole, and so construed as to give effect to every word in it, if possible. Contradiction, if there be any, must be reconciled by choosing, from the different meanings a word or clause may have, that one which will harmonize with other parts of the instrument. The spirit of the statute, rather than its letter, is the guiding star, but the letter also is to be regarded, and given effect if possible. *Gas Co. v. Wheeling*, 8 W. Va. 320; *Brown v. Gates*, 15 W. Va. 131; *Jackson v. Kittle*, 34 W. Va. 207, 12 S. E. 484; *Bank v. County Court*, 36 W. Va. 341, 15 S. E. 78; *Baxter v. Wade*, 39 W. Va. 281, 19 S. E. 404. Keeping this general rule of construction in view, due weight must be accorded to the absence of any expression of preference in the statute for crossings other than grade crossings. It does not say, as do the statutes of some of the states, that a crossing at grade shall not be made where it is practicable or possible to make an overgrade or undergrade crossing. On the contrary, it confers the right to a crossing at grade or other-

wise, and authorizes the courts of equity to prescribe the kind of crossing when the parties fail to agree. If there is any discrimination against grade crossings, it is by implication arising out of the proviso forbidding the impending of traffic; and, if such effect is to be accorded to it, the right to a grade crossing, expressly conferred by the preceding clause of the section, is taken away entirely. As already indicated, well-settled principles of law compel the courts to avoid, by construction, when it is possible to do so, an interpretation of a statute that will leave any part of it noneffective and dead. "Conflict and repugnance in statutes should always be avoided by construction, if possible. Indeed, a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word should be superfluous, void, or insignificant." Lucas, J., in *Jackson v. Kittle*, 34 W. Va. 216, 12 S. E. 488. A right expressly given in one part of an instrument cannot be taken away by a mere implication arising out of another part of it, which is not one of necessity, if it can be taken away by implication at all. Thus: "A clearly expressed intention in one portion of a will is not to yield to a doubtful construction of any other portion of the instrument. When the general intent of the testator is clear, and it is impracticable to give effect to all the language of the instrument expressive of some particular or special intent, the latter must yield to the former, but every expressed intent of the testator must be carried out when it can be done." *Bell's Adm'r v. Humphrey*, 8 W. Va. 1, 6. The peculiar nature of the subject with which this section deals, and the prevalent conditions and practices relating to it, must be kept in view. Necessity, convenience, and practicability of the grade crossing have been demonstrated and fixed by experience. Though discriminated against by legislation in some states, they are nowhere prohibited. For reasons of economy, peculiarity of topography or connection, or others, they are found everywhere, and yet the great transportation lines of the country are operated with reasonable safety and rapidity over them. So general is the use of them that vast sums of money are constantly laid out in derailing switches, electric bells, and for watchmen and other safeguards. They are found in densely populated cities, where trains crowd upon one another, and on the broad plains, where long reaches of straight and level track are passed over at the highest possible rates of speed. Of such infinite variety are the topographical, financial, commercial, operative, and other considerations involved, that the possibility of railroad construction and operation without them has not yet been demonstrated. Are we to assume that the Legislature intended to ignore all these weighty conditions of the subject-matter of its action; to obstruct, rather than facilitate, railroad business; make new conditions, instead of dealing with existing ones; arbitrarily substitute its own

judgment, contrary to all experience, for the usual, ordinary, and necessary methods of railroad construction? To do so would violate another firmly established rule of construction: "Where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy." *Smith v. Townsend*, 148 U. S. 490, 13 Sup. Ct. 634, 37 L. Ed. 533; *Daniel v. Simms*, 49 W. Va. 554, 556, 39 S. E. 690. Besides observing the express language of the statute, the subject-matter of the section, and conditions affecting it, and the rules of construction adverted to, the progress and course of legislation with reference to crossings through a period of more than 40 years must have due weight in seeking the true meaning of the language used. An undeviating course of legislation in a certain direction, in an effort to systematize and perfect the law, strongly emphasizes the express language embodying the final declaration of legislative will. "All former statutes on the same subject, whether repealed or unrepealed, may be considered in construing provisions that remain in force." *United States v. Le Bris*, 121 U. S. 278, 7 Sup. Ct. 894, 30 L. Ed. 946; *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690; *Forquaran v. Donally*, 7 W. Va. 114. The act of 1837 made no reference to any special kind of crossing. It simply gave the right to cross. Such was the form of the section in the Codes of 1849 and 1860 also. To give more definiteness and greater certainty of expression, the Legislature, by the act of April 3, 1873, conferred upon every corporation formed under it power "to cross, a grade, or to cross over or under, intersect, join and unite its railroad with any other railroad," etc. To concentrate all that is embodied in so much of the foregoing language as concerns crossings into fewer words, the act of March 10, 1881, provided that crossings may be made "at grade or otherwise." These weighty considerations against it make manifest the impossibility of adopting the construction contended for by counsel for the appellant, founded upon a mere implication drawn from the strict letter of the proviso, if the language of the proviso is susceptible of any other reasonable meaning; and, even if it is not, it might have to yield under the several rules of construction referred to.

But this is avoided by the conclusion reached by the learned judge of the circuit court, which is undoubtedly correct, and in perfect accord with the foregoing rules and expression of views. He says: "Therefore it cannot mean that the obstruction and delay due to the passing of trains or the danger of accidents at grade crossings are to be considered as things which impede transportation, within the meaning of the statute. The terms used in the statute make this clear. It is not provided that, as a result of the crossing when built, there shall be no impediment to traffic, but the requirement

is that the 'work shall be so constructed as not to impede.' The statute refers to the manner in which the work shall be constructed, and not to the incidental effect of the crossing, due to the passing of trains and cars over the roads." A moment's reflection suggests that any kind of crossing may be so constructed as to impede the passage of persons and transportation of property. An overgrade or undergrade crossing could be so made, and the only purpose of the proviso is to compel avoidance of all impediments and inconveniences not necessarily incidental to a properly and skillfully constructed crossing; leaving it to the court to say, passing upon all the facts and conditions involved in each particular case, what crossing shall be made when the parties interested cannot agree.

All this being determined against the appellant, its counsel still says the decree is wrong, because, under the circumstances, an overgrade crossing, if any, should have been ordered by the court. This contention rests principally upon the impossibility of making a smooth, even crossing. The point of intersection fixed by the decree is on a grade of the traction company's road, descending towards the north, and approaching Buffalo creek, near which it runs on trestlework, and on a curve in the steam railroad track, in consequence of which the outer (northern) rail of its track at that point must be higher than the inner rail. As first proposed, the difference in height was 5 inches, such as scientific construction requires for a speed of about 21 miles per hour on a curve of the degree in question, in order to overcome the centrifugal force when a train is running over it, which varies with the speed of the train. The decree provides that the difference shall not exceed 1 inch, and, further, that the track of the electric road "north and south of the crossing shall be graded so as to smooth out the crossing at the expense of the plaintiff." This, however, still leaves an irregular hump in the track of the defendant company's road. It converts a down grade, going north, into about a 2 per cent. up grade, and vice versa, running south; and, as the crossing is not at right angles, a car passing over it on the electric road will be thrown into a slight twist, for opposite wheels of the car truck will not pass over simultaneously. This irregularity, the necessity for the exercise of caution in approaching the crossing, arising from the possibility of collision with trains from the other road, and the actual occupation of the crossing by the trains of the steam railroad at times, will compel the electric cars to reduce their speed, and occasionally even stop, at that point, and, to that extent, impede the passage of persons and transportation of property along the electric road. For these reasons, and because defendant's track must be altered to enable the plaintiff to cross at all without stopping traffic on the defendant's line, it is urged that the court should have decreed an overgrade crossing.

For an overgrade crossing, two plans were suggested—one

by each party to the controversy. As the Pittsburg, Wheeling & Kentucky Railroad, with which the new road coming from the east desires to connect, lies along the bank of the river, and the electric railway track next to it, with a narrow strip between them, the first plan, produced by the plaintiff, carries the new road over the tracks of the Pittsburg, Wheeling & Kentucky Road and the Panhandle Traction Company Road, and makes it join the Pittsburg, Wheeling & Kentucky Road on the west side thereof. The other carries it over the electric company's track only, and then down the narrow strip between the two existing roads, so as to join the Pittsburg, Wheeling & Kentucky track on the east side. The first involves a much higher crossing than the other, and therefore longer approaches over worse ground, and much greater cost. Constructed of piling and wooden trestlework, its cost is estimated at over \$100,000; and of stone and steel or iron, over \$200,000. To construct the other, it would be necessary to take part of the right of way of the Pittsburg, Wheeling & Kentucky Railroad Company, or the Panhandle Traction Company, or both; and, besides these difficulties, the cost would still be not less than \$30,000. Speaking of the cost, after considering both plans, the learned judge of the trial court said: "It will be out of all proportion to the proper cost of a crossing, when we consider the probable amount of money expended in the construction of either of the roads concerned in this case."

The road to be crossed is an electric road, permitting greater latitude in respect to grades, curves, and regularity of track than in the case of a steam railroad, having heavier and longer rolling stock; and none of the several civil engineers and others experienced in electric railway construction, examined as witnesses in the case, have pointed out any serious consequences that are likely to result from the construction of the crossing as prescribed by the decree, other than the dangers and inconveniences incident to grade crossings generally. Uniformity in grade of the defendant's track will be broken, as hereinbefore indicated; but the expert witnesses for the defendant do not go so far as to say the irregularity to be produced will endanger passengers, or inflict upon them any discomfort of any consequence. Robert Hazlett, engineer of the defendant company, does say: "It would make a very bad piece of track, and, the worse condition the track is in, the more severe it is on the rolling stock, aside from any discomfort the passengers would be put to in riding over a bump like that." But he was then speaking of the crossing as first proposed, involving an elevation of the north rail of the steam railroad track to the extent of five inches above the south rail, instead of one inch, the maximum difference allowed by the decree. It is significant that he fails to say passengers would be actually endangered or seriously discomforted by a difference five times as great as that allowed.

For anything appearing in the testimony, the cars will be easily propelled over the crossing, and, in the absence of negligence, without danger of derailment or any heavy jolting. The criticisms of the expert witnesses are, for the most part, such as apply to all grade crossings. They condemn them as increasing danger and causing delay, but, as we have seen, they are allowed by the statute, which also fails to declare any preference for other kinds of crossings. Some obstructions to view as the crossing is approached are referred to as increasing the ordinary dangers incident to a crossing at grade, but the court, in its decree, makes provision for this by requiring the plaintiff to keep a watchman stationed at the crossing.

On the whole, no reason for disturbing the decree is perceived. The construction required by it is the best that is possible under the circumstances. The curve in the track of the steam railroad at the point of crossing, and the obliquity of the crossing of the tracks, which occasion the irregularity in the track of the electric road, are unavoidable; but they do not make an unusually dangerous crossing, if, indeed, they add anything to the danger of a crossing at grade, and the cost of an overgrade crossing would be comparatively very heavy. Our legislative policy encourages the construction and operation of railroads, as necessary agencies of internal improvement, promotive of the development of material wealth, industry, and commerce, and conducive to the convenience, comfort, and well-being of the people. Therefore, when it is practicable to make a reasonably safe and convenient crossing at grade at small cost, this policy would be infringed and trenched upon by refusing a demand for it because it is possible to make an overgrade or undergrade crossing at a cost so great as to practically prevent the building of the road. "The courts everywhere justly hold that the organization of these corporations is favored and encouraged by the Legislature. * * * In no state or county is there greater necessity or reason for railroad building and extension than in the state of West Virginia." *Deepwater Railway Co. v. Lambert et al.* (W. Va.) 46 S. E. 144. Obviously the authority conferred upon the court is administrative, as much as judicial, and intended to aid and safeguard the exercise of the power of eminent domain, to the end that the public welfare may be subserved by enabling railroad construction to proceed wherever it may be safely, conveniently and economically carried on, as well as to prevent the unnecessary injury which might result from allowing either party to determine the kind of crossing to be made. Legislative power is, no doubt, ample to require overgrade or undergrade crossings wherever practicable, but, until it does so, the courts have no power to read such a discrimination into the statute. The public good, rather than the interests of existing railroad companies, is the controlling

factor, and the courts are bound to act in harmony with the legislative declaration of policy and judgment as to what will best subserve the public interests.

A question extensively debated in the trial court is whether the party desiring the crossing may make choice of the location and kind of crossing, leaving it to the court to say only upon what conditions, other than the payment of compensation, it shall be made. We think the court properly ruled that the crossing to be decreed must be determined by the case made, and not by the choice or will of the plaintiff. This is in perfect accord with the observations hereinbefore made concerning the nature of the subject-matter of the statute, and the power conferred upon the court in respect to it.

Whether the power vested in the circuit court is to any extent discretionary is not involved here, as the decree, viewed from any reasonable standpoint, is correct. The statute authorizes a decree for "any proper crossing." May there be more than one such crossing at a given point? If so, is the exercise of its discretion by the court, in adopting one out of several, reviewable, except in cases of abuse of discretionary power? But viewing the power vested in the circuit courts as an important quasi administrative or legislative, rather than a purely judicial, jurisdiction, ought not the exercise of it by these courts to be reviewable, as their decisions are in all cases in which they affect matters of right?

A cross-assignment of error is grounded upon the action of the court in decreeing costs against the plaintiff. As to costs, the statute under which the suit was brought is silent. The provisions of chapter 42 concerning costs in condemnation cases have no application, for this suit is not under that statute. Therefore, if the plaintiff can have costs at all, the general statute on the subject of costs must apply, and under it the court must decree costs to the party substantially prevailing. Who is that party in this instance? The plaintiff obtains a crossing—the thing demanded by the bill, if it be regarded as a general demand, but not the exact crossing it sought, for the court substantially modified the character of construction proposed by the plaintiff. Instead of allowing a difference of five inches in elevation between the inner and outer rails of the steam railroad track at the point of intersection, the decree prescribes a difference of not more than one inch, which will reduce the speed on plaintiff's road at that point from about twenty-one miles per hour to about eight. Ought not the plaintiff, to entitle itself to a decree for costs, be required to demand of the defendant, before suit, such a crossing as the court will decree? The ascertainment of the proper crossing in each case requires labor and expense, and, as between the parties, this labor and money is expended for the sole benefit of the plaintiff. Each case involves, and is practically determined by, the application of

Atchison, etc., Ry. Co. v. Thomas

the principles of a science so thoroughly developed that competent men will scarcely ever seriously disagree as to what crossing ought, under all the circumstances, to be made, when acting under correct information and knowledge as to the legal rights of the parties. It may be urged that the defendant, by basing its refusal to agree and its defense in this suit upon false conceptions of the law and of its legal rights, necessitated the bringing of this suit, and for that reason ought to be subjected to costs. But if the plaintiff is itself in fault, under a proper determination of the rights of the parties, its fault is not excused by that of the defendant. We must look for the immediate legal cause of litigation, not a remote cause or moral delinquency. To require the plaintiff to demand, before suing, such a crossing as the court will allow, will compel such a complete investigation and such skill and care in the selection of the crossing for which suit is brought as ought to precede any decree, and the party to be specially benefited by the decree should bear the expense. The obvious purpose of the Legislature in giving the remedy afforded by section 11 of chapter 52 of the Code of 1899 is to prevent the making of haphazard, accidental, ill-considered, and unskillful crossings, and this ruling is therefore in harmony with the spirit of said section. It also accords with the law governing costs. An action brought for a debt before it is due must fail. No costs can be had after a tender of the amount due, although there may be a judgment for the debt. A demand for a crossing must precede the suit. Can the party of whom it is demanded be expected to assent to it if it is not a proper one? Whether, in any such case, costs may be decreed to the plaintiff, we do not say. The point does not arise.

Seeing no error in the decree, we affirm it.

ATCHISON, T. & S. F. RY. CO. v. THOMAS.

(Supreme Court of Kansas, Dec. 1, 1904.)

[78 Pac. Rep. 861.]

Breach of Contract—Damages.

Damages recoverable upon breach of a contract are those damages only which are the direct and proximate result of the wrongful act of which complaint is made.

Same—Same.

Damages which are speculative, remote, or contingent cannot form the basis of a recovery for the breach of a contract.

Same—Same—Anticipated Profits.

Damages for anticipated profits recoverable upon breach of a contract must be established with a reasonable degree of certainty, must be the natural and proximate consequence of the breach, and be free from conjecture and speculation.

Same—Same—Same.

Where, in consideration of money advanced to inaugurate and establish a time-service system for a railway company, T. was verbally

Atchison, etc., Ry. Co. v. Thomas

given by the railway company the right to sell, to its employees required to carry watches of a certain fixed standard, 4,800 watches of a certain model bearing a copyrighted trade-mark and meeting the required standard, and where the railway company agreed to protect upon its books and collect for T. from the personal earnings of the employees, while in its employ, their orders on the treasurer of the company payable in monthly installments of \$5 each, but no assurance was given to T. that the employees would purchase watches of him, and they were privileged to buy and carry any watch which would meet the required standard of the time service, and the railway company thereafter refused to longer protect upon its books and collect such orders for T., but not until T. had sold to employees all the watches he had on hand when such arrangement was made, and T. was under no local obligation to purchase additional watches, *held*, in an action by T. against the railway company to recover damages for a breach of contract, where the damages were for loss of profits on watches which T. claimed he might have sold to the employees, that his claim for damages was too speculative, remote, and contingent.

(Syllabus by the Court.)

Error from District Court, Jefferson County; Marshall Gephart, Judge.

Action by Frank S. Thomas, doing business as M. A. Mead & Co., against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Robert Dunlap and A. A. Hurd, for plaintiff in error.

Ferry & Doran and David Overmyer, for defendant in error.

ATKINSON, J. This was an action by Frank S. Thomas, doing business under the firm name and Style of M. A. Mead & Co., of Topeka, Kan., against the Atchison, Topeka & Santa Fe Railway Company, to recover \$48,888, damages for the breach of a contract. Verdict and judgment for plaintiff in the sum of \$20,000.

In June, 1896, Frank S. Thomas, with one H. S. Montgomery, with whom he had for the purpose formed a copartnership, entered into a contract with the Atchison, Topeka & Santa Fe Railway Company, in the name of H. S. Montgomery, to inaugurate a uniform time service, and establish a system of inspection of clocks used by defendant, and watches used by its employees, over its several lines of railroad. As a part of the contract with defendant, Montgomery, who was a practical watchmaker, was by defendant appointed its general watch and clock inspector, with a salary from defendant of \$500 per annum. Thomas, as a part of the contract, agreed to finance the enterprise, pay Montgomery a salary of \$60 per month, and share equally the profits of the business with Montgomery. Defendant refused to appoint Montgomery its general watch and clock inspector until all his debts were paid, that it might not be annoyed by his creditors. Thereupon Thomas paid about \$3,000 of Montgomery's debts to constitute him eligible for appointment. Thomas also agreed to superintend, and at his own expense, through Mont-

Atchison, etc., Ry. Co. v. Thomas

gomery, rate, regulate, and repair, all clocks in use by defendant along its lines of railroad, and inspect, rate, and regulate the watches of those employees of defendant who were by defendant required to carry watches to conform to the requirements of the time-service system. In consideration therefor, and as a part of said contract, defendant agreed, through its general manager, that Thomas and Montgomery, in the name of the latter, should have the right to supply and sell to the employees of defendant certain watches of a uniform character, and of a standard to meet defendant's requirements. The contract received the aid and encouragement of defendant. A circular was issued by the general manager. It defined the time service and its requirements. It announced that the employees in the operating department of the road would be required to carry watches to meet the required standard. The circular also called the attention of the employees to the fact that, while any watch which would come up to the required standard would be sufficient, watches meeting the required standard could be purchased of Montgomery, as general watch and clock inspector, at reasonable prices and on monthly installments. Thomas and Montgomery caused to be constructed by the American Waltham Watch Company watches of a certain model and of a standard to meet the requirements of defendant, and caused to be placed thereon their trade-mark, the words "Santa Fe Route," which trade-mark they had caused to be copyrighted in the name of Montgomery, who assigned to Thomas a one-half interest therein. In the sale of these watches to the employees of defendant, the note of the purchaser was taken, payable to the order of H. S. Montgomery, in monthly installments of \$5 each.

This contract continued to July 1, 1897, a little more than one year, when it was terminated by defendant without the consent of plaintiff. Its termination was affected by a circular issued by the president of the railway company. The circular was a general one prohibiting the employees of the company from engaging in private business. The effect of the circular was to disqualify Montgomery, as general watch and clock inspector of the railway company, from further engaging in the sale of watches to the employees of defendant, unless expressly authorized by the president to continue their sale. To so disqualify Montgomery had the effect to terminate the contract as to Thomas. In the sale of watches to the employees of defendant, it was claimed by Thomas he could only successfully operate when operating through Montgomery, as he had been doing. Soon after the issuing of this circular by defendant, Thomas and Montgomery went from Topeka to Chicago to see and confer with President Ripley with reference to the effect of the circular on Montgomery and on the business of selling watches to the employees of defendant. The president was firm in the

position that Montgomery could not continue general watch and clock inspector of defendant and at the same time engage in the sale of watches to employees. He declared Montgomery must quit the sale of watches or discontinue the duties of inspector. Thomas explained to President Ripley the contract between himself, Montgomery, and defendant, made through the general manager of defendant; explained that he and Montgomery were partners in the enterprise; represented to the president that to apply the provisions of the circular to Montgomery, and thereby cause his discontinuance of the sale of watches to employees, or the discontinuance of the sale of watches to the employees through Montgomery, would be ruinous to the business of selling these watches; that he (Thomas) had financed the enterprise, and had expended large sums of money in inaugurating the time service for defendant; that there were a large number of watches of the special model and design which would be without a market and worthless; that he had on hand many installment notes of the employees taken in the name of Montgomery, given for the purchase of watches; that these notes would be difficult of collection from the employees; that the employees of defendant would pay the notes more readily when made payable and apparently belonging to Montgomery, an officer of the company, than if made or assigned to another; and that it would result in great financial loss and be ruinous to him.

The claim is made by Thomas that defendant, through President Ripley, admitted that it had been greatly benefited by the time service. The claim is also made that the president then stated that in consideration of the money advanced by Thomas in inaugurating the time service, and in compromise of the claim of Thomas for the damage he would sustain from the act of defendant in terminating the contract, defendant would reimburse Thomas for the money he had expended in inaugurating the time service system; would give to Thomas the right to sell to the employees of defendant 4,800 watches of the model bearing the "Santa Fee Route" trade-mark; would give to him the right to take from the employees of defendant an order on the treasurer of defendant, authorizing defendant to deduct \$5 per month from the earnings of the employee in payment for the watch purchased; that defendant would, in so far as it was able to do so, collect these orders for plaintiff; and also that defendant would undertake to collect from its employees, in so far as it was able to do so, the installment notes therefore given in the name of Montgomery in payment for watches sold to the employees. The further claim is made by Thomas that he agreed to this proposition of settlement, and also that he undertook and agreed to sell to the employees of defendant 4,800 watches of the model bearing the trade-mark.

Thomas, through Montgomery, accepted from defendant

Atchison, etc., Ry. Co. v. Thomas

an amount in satisfaction of his claim for money advanced in installing the time-service system. Defendant collected from its employees, in so far as it was able to do so, the installment notes given to Montgomery in payment for watches. Under the name of "M. A. Mead & Co., of Topeka, Kansas," Thomas entered upon the new arrangement made with defendant, through President Ripley, for the sale of watches. He sold 726 watches to the employees of defendant on the order system, and the orders so taken were by defendant protected on the books of the company, and by defendant collected for plaintiff from the personal earnings of the employees giving such orders. The sale of watches under this arrangement was by plaintiff discontinued on January 1, 1900, due to defendant refusing to longer accept and collect orders given by its employees for the payment of watches. Plaintiff then brought this action in damage, claiming \$48,888, a loss of \$12 profit on each of the 4,074 watches remaining unsold of the 4,800 watches plaintiff claimed, under the arrangement with defendant, the right to sell. Defendant filed a general denial, but upon the trial of the case interposed numerous defenses to plaintiff's claim. The trial resulted in a verdict and judgment for plaintiff in the sum of \$20,000.

Numerous errors are assigned by the railway company—among others, that the court erred in giving instruction No. 16, which is as follows: "If you find from a preponderance of the evidence that the plaintiff is entitled to recover in this action, then his measure of damages would be the profits on the number of watches which he has shown by a preponderance of the evidence he could have sold, and was prevented from selling to the employees of defendant company by reason of defendant refusing to protect such sales on the pay roll of the company, not exceeding in amount the sum of \$48,888."

It is the contention of defendant that plaintiff's claim for damages is too remote and contingent, that it is open to the charge of being prospective, and that it enters the domain of speculation. It is urged that, for the reason assigned, plaintiff's claim for damages cannot constitute the basis for a valid judgment; that instruction No. 16, complained of, relative to the measure of plaintiff's claim for damages, was erroneous.

On January 1, 1900, when plaintiff's right to sell watches to the employees of defendant was terminated, he had sold all the watches of the design or model bearing the trade-mark which he had on hand at the time the arrangement was made with defendant giving to him the right to sell 4,800 watches to the employees. Plaintiff was under no legal obligations to purchase watches of the model bearing the trade-mark, to make up or complete the 4,800 watches. His claim for damages is based wholly upon the profits he claims he could have made; not upon watches owned by him, or upon watches

which he was under a legal obligation to purchase, but upon watches which he could have purchased, and which he claims he could have sold to the employees of defendant at a profit of \$12 on each watch, had his arrangement with defendant not have been terminated. The only testimony upon the question of plaintiff's damages was that of plaintiff himself, who testified that he would have realized a profit of \$12, net, upon the sale of each of the remaining 4,074 watches, could he have sold them to the employees under the arrangement he had with defendant.

It is the aim and purpose of the law to give to a party injured by the breach of a contract all the damages which he may suffer from such breach; and where the contract is made with a view to future profits, and such profits are within the contemplation of the parties, they may, where they can be established with certainty, form a just measure of damage. But the right to recover damages for anticipated profits has always been, and will continue to be, a troublesome question. No fixed rule can be laid down which, when applied to the facts of a case involving damages for anticipated profits, will determine whether a recovery may or may not be had. Each case must be determined on the facts peculiar to itself. The authorities both in the United States and England are agreed as a general rule, subject to certain well-established qualifications, that anticipated profits prevented by the breach of a contract are not recoverable in the way of damages for such breach; but in the application of this principle the same uniformity in the decisions does not exist. In some cases of almost exact analogy in the facts the adjudications of the courts in the different states are directly opposite.

In *Gas Co. v. Glass Co.*, 56 Kan. 614, 44 Pac. 621, it was sought to recover damages for breach of a contract in which the gas company agreed to deliver at the works of the glass company, for 10 months, all the natural gas necessary to run a 12-pot glass factory for the manufacture of glass bottles. The main controversy in the case was over the allowance of prospective profits. It was contended by plaintiff that the net profits would have reached the sum of \$10,000. In the opinion by Mr. Justice Johnston it was pointed out that the success of the venture depended not alone upon the supply of fuel. The manufacture of glass in Kansas at that time was a new enterprise. It was subject to many contingencies. The material found had not yet been used for making glass. A market had not been found for the product. The product must be sold on a new market. It must be sold upon that market at a price in excess of the cost of production, to yield a profit. This would involve the expense of proper advertising, the building up of a credit and reputation, the state of the glass trade, the competition that would have to be met, the rates of shipment, and the cost of the sale of the product. It was held that the question of profits was largely a matter

Atchison, etc., Ry. Co. v. Thomas

of speculation and conjecture. Plaintiff was denied a recovery on its claim for estimated and anticipated profits. This case finds support in the following cases decided by this court: *States v. Durkin*, 65 Kan. 101, 68 Pac. 1091; *Investment Co. v. Burdick*, 58 Kan. 517, 50 Pac. 442; *Walrath v. Whittekind*, 26 Kan. 482; *M., K. & T. Ry. Co. v. City of Fort Scott*, 15 Kan. 435.

In *Railway Co. v. City of Fort Scott*, supra, it was sought by the city to recover damages for breach of a contract in which the railway company had agreed, in consideration that the city issue to it \$100,000 of the bonds of the city, to construct its lines of railroad through the city, and locate in the city its division points, roundhouse, machine shops, etc. Damages were sought to be recovered by the city from the railway company, mainly for a failure of the company to locate in the city its division points, roundhouse, and machine shops. Testimony was admitted tending to show a decline in the population of the city and a depreciation generally in the value of real estate, after the construction of the road through the city, and the location of the division points, roundhouse, and machine shops elsewhere. It was held the claim of the city was too speculative, too remote and uncertain; that the direct and pecuniary loss of the city, only, in an action *ex contractu*, was the proper measure of damages. It was held there was no certain connection of cause and effect between a failure to build roundhouses and machine shops and in the decline of population or the decrease of values in real estate. In the opinion by Mr. Justice Brewer, many contingencies are referred to, which might produce the results complained of, that could not be traced to the act of the railway company.

Plaintiff, in support of his claim that the damages he recovered are not subject to the charge that they are too speculative, too remote and contingent, to constitute the basis for a recovery, directs our attention to the fact that this court recognized anticipated profits as the basis of a recovery in each of the following cases: *Hoge v. Norton*, 22 Kan. 374; *Osborne v. Stassen*, 25 Kan. 736; *Brown v. Hadley*, 43 Kan. 267, 23 Pac. 492; and *Town Co. v. Lincoln*, 56 Kan. 145, 42 Pac. 706. These cases were cited for the same purpose in *Gas Co. v. Glass Co.*, supra. In distinguishing the cases cited from that case, and which will apply equally well to the facts in the case at bar, in the opinion at pages 624, 625, 56 Kan., page 624, 44 Pac., it was said: "Much reliance is placed upon the rulings of this court in the cases of *Hoge v. Norton*, supra, *Brown v. Hadley*, supra, and *Town Co. v. Lincoln*, supra. All of these cases are close to the border line dividing profits which may be allowed from those which should be rejected. In each of them, however, the business upon which profits were allowed was not new or untried, but had been established and carried on to such an extent in the

community that a safe basis of calculation could be found. In *Hoge v. Norton*, supra, profits were estimated on the cattle business, which is well established in Kansas, and is carried on to such an extent that the laws of feeding and growth are well understood, and the results reasonably certain. In *Brown v. Hadley*, supra, the business was dairying, which, it was said, has been extensively engaged in ever since the settlement of the state, and that therefor the gains could be estimated by men of experience in that business with reasonable certainty. In *Town Co. v. Lincoln*, supra, the breach of the contract resulted in breaking up an established business, and the profits that had been made for a reasonable period next preceding the time of the breach furnished a reasonably certain basis of calculating those that would have been realized if no breach had occurred."

In *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 49 C. C. A. 244 (United States Circuit Court of Appeals, Eighth Circuit), the only damages claimed in the petition, and the only losses which the plaintiff sought to prove at the trial, were the losses of some of the expected profits of his business of buying and selling coal within a period of about two years. Plaintiff was denied a recovery on the ground that the anticipated profits were too remote and speculative. Upon the question of the right to recover damages for anticipated profits, the court laid down the following rule: "The general rule is that the anticipated profits of a commercial business are too remote, speculative, and dependent upon changing circumstances to warrant a judgment for their loss. There is an exception to this rule: that the loss of profits from the interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his actual loss was."

In *Machine Co. v. Bryson*, 44 Iowa, 159, 24 Am. Rep. 735, defendant was not permitted to recoup in damages claimed on a breach of contract, being the failure of plaintiff to supply defendant with sewing machines for sale. The damages claimed, for which a recovery was refused, were the anticipated profits that defendant claimed he could have made on commissions from anticipated sales of sewing machines within a limited territory. Held too remote, contingent, and speculative.

It is not claimed defendant prohibited plaintiff from selling watches to the employees of defendant, but only that defendant refused to protect upon its books and collect after January 1, 1900, orders of the employees given to plaintiff in payment for watches sold. Plaintiff had no guaranty from the company that he could sell 4,800 watches, or any number of watches, to its employees. The employees had not been required by defendant to purchase this model or design of watch. Any watch which would meet the required standard of the time service was sufficient. The employees were not re-

quired to purchase watches of plaintiff. He had no assurance that he might be able to sell these watches to the employees. He had no assurance that, if these watches could be sold to the employees, it would continue to be at a price at which he could derive a profit. Nor had he assurance there could be a collection of the orders given for watches sold. In the sale of these watches to the employees he might be required to meet as competition, along the thousands of miles of defendant's railroad, all the watches for sale upon the market which would meet the required standard. The watches he was offering for sale were of a fixed design or model. It is a well-known fact that in all such mechanical productions new and improved models are frequently being placed upon the market. Plaintiff, in the sale of watches to the employees of defendant, might have to meet and compete with watches of the later improvements to be found in these newer models. The greatest reason plaintiff could have to believe he might be able to sell watches to the employees of the company was that his prices were reasonable and his terms easy; but he was given no assurance by defendant or by its employees, nor had he assurance from any source, that competitors might not offer watches to the employees of defendant at a less price and on easier terms. He was not guarantied the exclusive right to sell watches to the employees of defendant upon the order system, nor was he guarantied the right to sell watches to the employees of defendant through the local inspectors of defendant. The profit which plaintiff might make was not only contingent upon the fact that his model might continue a salable one, but contingent upon the number of watches he might be able to sell, and also contingent upon the price at which he might be able to sell them, and that he might be able to collect for the watches sold. The record discloses that under the last arrangement with defendant he had sold 726 watches in about 2½ years. At that rate it would require more than 14 years to dispose of the remaining 4,074 watches. But there is no means of foreseeing with a reasonable degree of certainty that he would ever be able to sell them, or that there would be to him a profit on those he might in the future sell.

Plaintiff does not sue for losses already sustained, but for gain or profits which he claims was by defendant prevented. The unquestioned rule of the law is that damages of this character must be capable of being established with a reasonable degree of certainty, must be the natural and proximate consequence of the breach, and be free from conjecture and speculation. This state is unqualifiedly committed to this rule. *Gas Co. v. Glass Co.*, supra, and *M., K. & T. Ry. Co. v. City of Fort Scott*, supra. In further support of this well-recognized rule, see the following authorities: *Eckington, etc., Ry. Co. v. McDevitt*, 191 U. S. 103, 24 Sup. Ct. 36, 48 L. Ed. 112; *E. W. Bliss Co. v. Buffalo Tin Can Co.* (C. C.

Spencer v. Seaboard Air Line Ry. Co

A.) 131 Fed. 51; *Lowry v. Tile, Mantel & Grate Ass'n* (C. C.) 106 Fed. 46; *Allis v. McLean*, 48 Mich. 428, 12 N. W. 640; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, and notes; *Jones v. Call*, 96 N. C. 337, 2 S. E. 647, 60 Am. Rep. 416; *Chicago City Ry. Co. v. Howison*, 86 Ill. 215; *Master-ton v. Village of Mount Vernon*, 58 N. Y. 391; *Bridges v. Lanham*, 14 Neb. 369, 15 N. W. 704, 45 Am. Rep. 121; *Cincinnati Gas Co. v. Western Siemens Co.*, 152 U. S. 200, 14 Sup. Ct. 523, 38 L. Ed. 411; *Freeman v. Clute*, 3 Barb. 424; *Todd v. Minneapolis & St. Louis Ry. Co.*, 39 Minn. 186, 39 N. W. 318; *Master-ton v. Mayor of Brooklyn*, 42 Am. Dec. 38, and notes; *Gray v. Smith*, 83 Fed. 824, 28 C. C. A. 168; *Todd v. Keene* (Mass.) 45 N. E. 81; *Bierbach v. Goodyear Rubber Co.* (Wis.) 11 N. W. 514, 41 Am. Rep. 19; *Howard v. Stillwell & Bierce Mfg. Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; 8 A. & E. Encycl. of L. 608, 618; 13 Cyc. 36, 57. Many others might be cited. We would not be understood as holding or implying that damages may not be recovered on a breach of contract for loss of anticipated profits, where under the contract the profits claimed would be the natural and proximate consequence of the breach, and such as may be rendered reasonably certain, and do not enter the domain of speculation.

While it is not always easy to draw the line between anticipated profits which are the legitimate element of damages and those which are too remote, contingent, or uncertain, it is quite apparent that, under the authorities cited, plaintiff's claim for damages is entirely prospective. The profits claimed depend upon too many contingencies and are too uncertain to furnish a safe guide in fixing the amount of his damages. It carries with it too much of the element of speculation to be the subject of judicial determination. Plaintiff's claim for damages is visionary, and closely allied to the building of air castles or the indulgence of pipe-dreaming.

For error of the court in instructing the jury on the measure of plaintiff's damages, the judgment will be reversed. All the Justices concurring.

CUNNINGHAM, J., not sitting.

SPENCER et al. v. SEABOARD AIR LINE RY. CO. et al.

(Supreme Court of North Carolina, Dec. 6, 1904.)

[49 S. E. Rep. 96.]

Ultra Vires.

Whether corporate acts are ultra vires is a conclusion of law to be drawn from the facts stated.

Railroads—Consolidation—Application of Statute.

Priv. Laws 1901, p. 463, c. 168, confers authority on the Seaboard Air Line Railway Company to consolidate with any railroad or transporta-

Spencer v. Seaboard Air Line Ry. Co

tion company in the United States. Power is also conferred on any railroad or transportation company "now or hereafter incorporated" by the state of North Carolina, etc., to consolidate with the Sea Board Air Line Company. The Raleigh & Gaston Railroad Company was organized under an act of the General Assembly of North Carolina (Acts 1835-36, p. 17, c. 25): *held*, that it was included in the class of companies with which the Seaboard Air Line Company was authorized to consolidate.

Same—Same—Statute.

Under the act, power is conferred on both the Seaboard Air Line Railway Company and the Raleigh & Gaston Railroad Company to consolidate each with the other.

Same—Same—Same.

Priv. Laws 1901, p. 463, c. 168, empowering a majority of stockholders of certain railroads to consolidate with other companies, is an enabling act, and therefore imposes no duty or obligation on the corporations or their stockholders.

Same—Same—Eminent Domain—Payment of Dissenting Stock.

Priv. Laws 1901, p. 463, c. 168, empowering a majority of the stockholders of certain railways to consolidate with other companies, and providing for assessing and paying the value of the dissenting stock, is an exercise of the power of eminent domain.

Same—Same—Same—Same—Constitutional Law.

Since the right of railroads to consolidate under Priv. Laws 1901, p. 463, c. 168, authorizing payment of the value of dissenting stock, is an exercise of the power of eminent domain, a dissenting stockholder cannot rely on the inhibition of the federal Constitution as to the impairment of the obligation of a contract to defeat a consummated consolidation under the act, though her stock was purchased prior to Const. 1868, taking effect, reserving to the state the right to amend charters granted by it, and though her stock was issued by a company whose charter was granted when there was no constitutional reservation of power to amend.

Same—Same—Rights of Dissenting Stockholders—Laches.

Where, under the power conferred by Priv. Laws 1901, p. 463, c. 168, on railroads to consolidate, certain roads duly exercised the power, and the consolidation became effective, so that an interference therewith would involve millions of dollars of private interests, a stockholder dissenting from such consolidation, who, instead of asserting her rights promptly by appeal to the preventive jurisdiction of the court, waits more than two years before invoking the equitable power of the court to declare the consolidation invalid, is in no position, because of laches, to pursue that remedy.

Same—Same—Same—Payment of Stock.

Where, under the power conferred on railroads to consolidate by Priv. Laws 1901, p. 463, c. 168, certain roads duly consolidated, so that an interference therewith would involve millions of dollars of private interests, a stockholder dissenting from such consolidation, who has been guilty of laches in pursuing her equitable right to appeal to the courts, is fully protected by the offer of the defendant to pay the value of the stock, notwithstanding plaintiff's failure to proceed to have her stock valued as prescribed by the act; it appearing that the court granted plaintiff, with the assent of the defendant, the right to amend her complaint and have the value of her stock ascertained pursuant to the statute, and also directed the production of the books of the corporation for use in proving the value of the stock.

Douglas, J., dissenting.

Appeal from Superior Court, Wake County; Brown, Judge.

Suit by R. P. Spencer and another against the Seaboard

Spencer v. Seaboard Air Line Ry. Co

Air Line Railway Company and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

This is an appeal by the plaintiffs from a judgment upon a demurrer ore tenus at the October term, 1904, of the superior court of Wake county. The feme plaintiff, Ida T. Spencer, alleged: That she was the owner of seven shares of stock in the defendant corporation, the Raleigh & Gaston Railroad Company, of the par value of \$100 each; that she acquired the said stock in 1887, and has owned the same continuously to the date of the institution of this action; that said stock is represented by certificate No. 1,644, bearing date of April 13, 1887. "(2) That the defendant the Raleigh & Gaston Railroad Company was created and organized under an act of the General Assembly of North Carolina (chapter 25, p. 17, of the Acts of 1835-36), and has since that day continuously exercised the corporate powers thereby conferred, until the alleged merger of said corporation in what is known as the Seaboard Air Line Railway. (3) That the said Raleigh & Gaston Railroad Company, acting under and by virtue of certain alleged and assumed powers attempted to be granted under an act of the General Assembly of the state of Virginia, has endeavored to merge and consolidate itself with certain other railroads under the corporate name of the Seaboard Air Line Railway, and has become the alleged holding corporation in respect to said other subsidiary corporations; that such alleged merger and consideration was and is ultra vires, and beyond the corporate powers of said Raleigh & Gaston Railroad Company, and is invalid and void in so far as the plaintiffs are concerned. (4) That at a meeting of the stockholders of the said Raleigh & Gaston Railroad Company held in the city of Raleigh on May 20, 1901, in pursuance of a notice, a copy of which is hereto attached as part of this complaint, a majority of said stockholders undertook and attempted to take such action as would result in the merger and consolidation of said corporation as aforesaid; that said notice did not warrant such action; that at said meeting the said Ida T. Spencer, by her attorney in fact, said R. P. Spencer, appeared and protested against the action proposed to be taken by a majority of said stockholders, and thereupon filed a written protest against such action, a copy of which is hereto attached as a part of this complaint; that prior to said meeting several other meetings had been held, at which plaintiffs were not present, and of which they had no notice, at which certain proceedings were had, which plaintiffs cannot state, because the records of said corporation are not kept within the limits of the state, and plaintiffs have not been able to obtain access thereto; that the action of said meeting of May 20, 1901, was ultra vires and illegal and invalid and void as to the plaintiff; that, after filing of said protest, said R. P. Spencer, for himself, and on behalf of said Ida T. Spencer, withdrew from said meeting, and was

Spencer v. Seaboard Air Line Ry. Co

not present thereafter, and took no part in the proceedings. (5) That the said Raleigh & Gaston Railroad Company, so far as plaintiffs are concerned, has since the alleged merger and consolidation preserved its corporate identity and separate existence as a corporation, notwithstanding that since then it has nominally constituted an integral part of the so-called Seaboard Air Line Railway, and although it has not since then separately exercised its corporate powers and discharged its corporate duties; that it has not held any meeting of its stockholders or of its directors; that it has not published any statements of its receipts and disbursements; that it has not declared any dividends, but has subordinated itself to the management and control of the officers and directors of the said Seaboard Air Line Railway, although, as plaintiffs allege, it has done so contrary to law and in violation of its corporate duties and obligations. (6) That immediately prior to or immediately after said stockholders' meeting of May 20, 1901, the said Raleigh & Gaston Railroad Company, acting through certain officers and agents, of whom plaintiffs cannot procure definite information, attempted to sell, and sold 1,828 shares of the stock of said Raleigh & Gaston Railroad Company, which was held in its treasury for certain definite purposes; that the same was not sold for such purposes, but was sold in violation of the duties of said officers and of the rights of the plaintiffs; that it was sold to certain parties whose names plaintiffs cannot ascertain, but who were directly interested in the organization of the said Seaboard Air Line Railway; that it was sold secretly, without being offered for subscription to the stockholders of said road, including the plaintiffs, or to the public, and without any opportunity for bidders to bid for same; that it was sold at a grossly inadequate price, and no account has ever been rendered in respect to its sale and purchase. (7) That, under the charter and amendments thereto of the said Raleigh & Gaston Railroad Company, it had no right or power to acquire stock of other corporations, nor to do any of the acts which it has attempted to do and has done in connection with said merger and consolidation; that said acts are unknown to plaintiffs in detail and in their entirety, and will be, if possible, ascertained and disclosed to this court during the progress of this action; that all of said acts and doings which have resulted in said so-called merger and consolidation have been ultra vires, contrary to law, and in derogation of the manifest and inherent rights and privileges of the plaintiff Ida T. Spencer as a stockholder in said corporation. (8) That, if the said Raleigh & Gaston Railroad Company had maintained and discharged its separate duties as a corporation created and existing under the laws of North Carolina, the said stock of the plaintiff Ida T. Spencer would have largely increased in value, and would now have been a valuable asset of said plaintiff, but that the said Raleigh &

Gaston Railroad Company having undertaken to purchase the stock of other corporations and operate the same as a so-called holding corporation, having issued bonds to an amount at present unknown to plaintiff, having assumed the debts of many other corporations, having indorsed or guarantied bonds of other corporations, having assumed the burden of extending lines of railway upon its own credit, all of which it has done, and done many other things which were ultra vires and destructive of plaintiff's rights in the premises as one of its stockholders, the said stock has been prevented from receiving the dividends the said road would otherwise have earned; that if the said Raleigh & Gaston Railroad Company had been operated as a separate and distinct corporation, as it was originally chartered, and as it was intended that it should be, the plaintiff's stock would have produced for her large dividends during the past few years, whereas, owing to the illegal and destructive acts hereinbefore mentioned, her stock has produced for her no dividends whatsoever. (9) That the value of plaintiff's stock is not measureable in any degree by its present market value, because it has none, nor by its antecedent market value, which is not pertinent to this controversy; that the effect of the merger and consolidation has been to completely destroy the corporate existence of said Raleigh & Gaston Railroad Company, in so far as the actors therein could affect such destruction, and to destroy completely the value of the plaintiff's said stock, both commercially and intrinsically. (10) That the said Raleigh & Gaston Railroad Company, or the officers thereof, if any there be, or the officers of the Seaboard Air Line Railway, have either destroyed the books, records, and papers of the said Raleigh & Gaston Railroad Company, or have removed them beyond the limits of the state, either of which acts is contrary to law and in derogation of the rights in the premises of the said Ida T. Spencer as a stockholder in said corporation. (11) That the said corporation, the said Raleigh & Gaston Railroad Company, has ceased to act under and in pursuance of its charter and in compliance with its corporate duty and the laws of North Carolina for the two years last past, and since May 20, 1901; that thereby it has forfeited its charter, under the provisions of section 688 of the Code of North Carolina.

"Wherefore the plaintiffs demand judgment: (1) That the defendants the Raleigh & Gaston Railroad Company and the Seaboard Air Line Railway be required to disclose to this court as follows: When the attempted merger mentioned in this complaint went into effect, and what are its terms; what relation the defendant Raleigh & Gaston Railroad Company bore and now bears to said merger; what have been the annual receipts and disbursements of the said Raleigh & Gaston Railroad Company, as a separate entity, and in its distinct and separate corporate capacity, from January 1,

Spencer v. Seaboard Air Line Ry. Co

1901, to this date; what have been its annual net profits during said period; what stock of other companies it has acquired or attempted to acquire, what bonds of other companies it has purchased or assumed or guarantied or endorsed; to whom it sold said 1,828 shares of treasury stock, when, and at what price; to what uses or purposes the proceeds derived from the sale of said stock were applied; what disbursements it has made out of the funds of said Raleigh & Gaston Railroad Company, or otherwise, to effect such merger and consolidation, or in connection therewith or incidental thereto; who are the present corporate officers of the said Raleigh & Gaston Railroad Company; when and where the stockholders of said corporation held their last annual meeting, and what were the proceedings of such meeting, if any such meeting was held. (2) That the defendant the Raleigh & Gaston Railroad Company be required, under the direction of this court, to render an accounting of all its receipts and disbursements since January 1, 1901, to this date, as a separate and distinct corporation. (3) That the alleged merger and consolidation of the said Raleigh & Gaston Railroad Company with other corporations into what is known as Seaboard Air Line Railway be declared ultra vires and void as to these plaintiffs. (4) That a receiver be appointed for said Raleigh & Gaston Railroad Company."

At the session of 1899, p. 127, c. 34, the Legislature of this state incorporated the Richmond, Petersburg & Carolina Railroad Company, a Virginia corporation, and, by virtue of said act, declared that said new corporation should succeed to all the rights, etc., of the Virginia & Carolina Railroad Company, etc. By the provisions of an act of the General Assembly of Virginia approved January 12, 1900, the Richmond, Petersburg & Carolina Railroad Company was authorized, upon petition filed in the circuit court of Richmond, to change its name, etc. The said railroad company duly filed its petition in said court, praying that it be permitted to change its name to the Seaboard Air Line Railway Company, and pursuant to said petition an order was duly made by said court changing the name of said corporation in accordance with the prayer in said petition. By chapter 168, p. 463, Private Laws of 1901 of North Carolina, the Seaboard Air Line Railway Company, successor to the Richmond, Petersburg & Carolina Railroad Company, was empowered to exercise in this state all of the powers, etc., vested in the Richmond, Petersburg & Carolina Railroad Company under its charter and amendments thereto, etc. It was also provided that: "With the approval of two thirds in amount of its stockholders given at any annual or special meeting * * * it may * * * lease, use, operate, consolidate with or purchase or otherwise acquire * * * the Seaboard & Roanoke Railroad Company, or any railroad or transportation company now or hereafter incorporated,"

Spencer v. Seaboard Air Line Ry. Co

etc., “* * * and from time to time it may consolidate its capital stock, property * * * of any other such railroad or transportation company upon such terms as may be agreed upon by the respective companies, power being hereby granted to any railroad or transportation company or companies now or hereafter incorporated by or under any act of the General Assembly of the state of North Carolina with the approval of a majority in amount of its stockholders respectively given at a meeting called for such purpose or at which all of the shares of capital stock are represented in person or by proxy to make and carry out such contracts of consolidation or lease, sale or other mode of acquisition or disposition,” etc. Provision is made setting forth the terms of such contracts of lease, sale, etc., and requiring that a copy of the agreement be filed in the office of the Secretary of State. The statute contains the following proviso: “Any stockholder who dissents from any such consolidation or sale may within sixty days thereafter apply by petition to the superior court of Warren county, or any county in this state of which the dissenting stockholder was a resident at the time of the ratification of this act, to determine the value of his stock and shall be entitled to receive from said consolidated or purchasing corporation the value as thus determined of such stock upon transfer thereof to the new corporation; such value shall be assessed by a jury trial if the same be requested by either party and if the owner of said stock shall be a non resident of this state application may be made to United States courts having jurisdiction.”

The following notice was issued: “To the Stockholders of Raleigh and Gaston Railroad: Notice is hereby given that a special general meeting of the stockholders of the above named Company will be held at its office in the City of Raleigh, N. C., on the 20th day of May, 1901, at 9 o'clock a. m., for the purpose of taking into consideration Articles of Agreement of merger and consolidation of the following named railroad companies: Seaboard Air Line Railway, The Raleigh and Gaston Railroad Company [and other corporations named], heretofore entered into by the directors of said respective Companies, and at which meeting a vote by ballot will be taken for the adoption or rejection of said agreement. By order of the Directors: J. M. Sherwood, Secretary.”

The plaintiff filed and following protest: “To the Stockholders of the Raleigh and Gaston Railroad Company in Session at Raleigh, May 20, 1901, and to the President and Secretary of said Company: Mrs. Ida T. Spencer, upon whom notice was served of the meeting of stockholders of the Raleigh and Gaston Railroad Co., on May 20th, at 9 a. m., in Raleigh, to consider articles of agreement of merger and consolidation of a number of Ry. Companies, to wit, the Seaboard Air Line Ry., the Raleigh and Augusta Air Line

Spencer v. Seaboard Air Line Ry. Co

Ry. Co., and others, appears by attorney in meeting only to protest against such action, and does hereby protest against the consideration of said agreement, or of the adoption of the same, as being ultra vires, and injurious to and in derogation of her rights as a stockholder. Respectfully, R. P. Spencer, Attorney in Fact for Ida T. Spencer."

Pursuant to said notice a meeting of the stockholders was held in the city of Raleigh, N. C., on May 20, 1901. The chairman submitted the proposed agreement of merger and consolidation which had been duly executed by the other corporations; also a certified copy of the resolutions of the board of directors of the Raleigh & Gaston Railroad Company in relation thereto. The plaintiff thereupon filed the protest set out herein. The following resolution was thereupon unanimously adopted by a stock vote by ballot: "Resolved," etc., "that they do hereby approve and adopt the agreement of merger and consolidation between," etc.; naming all of the roads entering into the merger or consolidation. It is not necessary to set out the terms of the agreement, as no controversy is made in regard thereto. The contract was duly executed as alleged in the complaint. His honor upon the hearing rendered the following judgment: "In this cause the plaintiffs move the court for an order compelling the defendant the Seaboard Air Line Railway Company to bring within the jurisdiction of this court the records and books of the Raleigh & Gaston Railroad Company, and to permit plaintiffs to inspect the same. At the same time the defendants move the court to dismiss the action, and demur ore tenus to the complaint, because no cause of action is stated which plaintiffs can maintain, and that upon the pleadings the action cannot be sustained. The court is of opinion that under the provisions of the act of the General Assembly ratified February 27, 1901 (chapter 168, p. 463, Priv. Laws 1901), and the other acts pleaded and referred to in the answer, the only remedy the plaintiffs have is given by said chapter 168, viz., sue for the value of their stock at time of the consolidation, with interest thereon. The defendants having consented thereto, the plaintiffs may, if desired, file within thirty days an amended or new complaint for the purpose of recovering the value of their stock, and having the value assessed in the manner pointed out in said act. After such complaint is filed it will be competent to require the production of such books, records, etc., of the Raleigh & Gaston Company as tend to show such value. If the plaintiffs shall elect not to file such amended complaint to recover the value of their stock, then the court adjudges that this action must be dismissed, and defendants go without day and recover costs." From which judgment the plaintiffs appealed.

Busbee & Busbee, for appellants.

Day & Bell, T. B. Womack, Shepherd & Shepherd, and Murray Allen, for appellee.

CONNOR, J. (after stating the case). The plaintiff attacks the validity of the contract of consolidation or merger whereby the Raleigh & Gaston Railroad Company, together with a number of other companies owning and controlling connecting lines, became a part of the Seaboard Air Line System, upon several grounds, which it will be convenient to consider in the order in which they are discussed in the very excellent brief of her counsel. It is, of course, conceded that as the cause was disposed of by his honor in the superior court, and is before us, upon a motion to dismiss as upon a demurrer *ore tenus*, every allegation made in the complaint, with such construction thereof as is most favorable to the plaintiff, must be taken as true. This, of course, is so for the purpose of drawing the legal conclusions therefrom. The plaintiff says that certain acts of the defendant are *ultra vires*. This is a conclusion of law to be drawn from the facts stated. It is also to be noted that although the complaint makes no reference to the several statutes enacted by the General Assembly, which, being private acts, do not come under our cognizance unless referred to and proven, his honor's judgment expressly refers to at least one of them, and, in the argument before us, counsel treated them as being properly before us. The plaintiff says that a careful analysis of chapter 168, p. 463, Priv. Laws 1901, fails to show that any authority is conferred upon the Seaboard Air Line Railroad Company to consolidate, merge with, or purchase from any other railroad than the Seaboard Air Line Railroad Company; that the statute conferring such extraordinary power upon railroad corporations should be clear and explicit, leaving nothing to construction or doubt. Why that single corporation should have been named, in conferring the power, and other railroad companies referred to in general terms, does not very clearly appear. We think, however, that, by a fair and reasonable interpretation of the language of the act, the Raleigh & Gaston Railroad Company is included among those companies with which the Seaboard Air Line Company is empowered to consolidate—"and any railroad or transportation company now or hereafter incorporated by the laws of the United States or any of the states thereof." In conferring power upon other companies to consolidate, the language is equally comprehensive—"power being hereby granted to any railroad or transportation company or companies now or hereafter incorporated by or under any act or acts of the General Assembly of the state of North Carolina," etc. The Raleigh & Gaston Railroad Company certainly comes within this classification. It would seem to follow that the other provisions of the act, unless otherwise expressed, must be construed as referring to all companies thus included in the class upon which the power is conferred to consolidate. Any other construction would render nugatory the power conferred.

Spencer v. Seaboard Air Line Ry. Co

The plaintiff next insists that no consolidation can take place unless the power to so consolidate is expressly conferred upon both consolidating corporations. This proposition is sustained by the authorities cited. The reasons therefor are manifest. 10 Cyc. 293. We think that such power is conferred upon both corporations. Chapter 168, p. 463, § 1, Priv. Laws 1901, expressly confers upon the Seaboard Air Line Railroad Company the power, "with the approval of two thirds in amount of its stockholders," etc., "to lease, operate, consolidate with or otherwise acquire," etc. As we have seen, the power is conferred upon the Raleigh & Gaston Railroad Company to enter into the contract of consolidation, etc. The evident purpose of the Legislature was to enable the Seaboard Air Line Railway to form, by consolidation, merger, or purchase, a system of transportation through the state, connecting with railroads in Virginia and South Carolina. The legislation in this state, together with that in Virginia, in regard to the Seaboard Air Line Company, which is expressly referred to in the preamble to chapter 34, p. 127, Laws 1899, and chapter 168, p. 463, Laws 1901, shows this to be the purpose and scope of the several statutes. This being ascertained, the principle by which we should be guided in interpreting the statute is thus stated: "Every statute is to be construed with reference to its intended scope and the purpose of the Legislature in enacting it; and where language used is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and carry out the purpose of the statute." Black on Interpretation of Laws, 56; Endlich, 73. It is settled that the power to consolidate may be conferred either in the charter, or by a general enabling act. 10 Cyc. 289.

The plaintiff next contends that, assuming that the statute confers the power upon the Raleigh & Gaston Railroad to consolidate, such power can be exercised only by the unanimous consent of the stockholders; that a dissenting stockholder cannot be compelled to surrender his stock in the corporation, and accept in lieu thereof stock in another company; that unless such power is conferred upon the majority of the stockholders in the charter, or by amendment thereto made before the subscription of the dissenting stockholder, an act of the Legislature conferring such power would be invalid, as impairing the obligation of the contract between the stockholders. This proposition is amply sustained upon principle and authority. The Supreme Court of the United States, in *Clearwater v. Meredith*, 68 U. S. 25, 17 L. Ed. 604, discussing a statute permitting a consolidation of several railroad companies, says: "The power of the Legislature to confer such authority cannot be questioned, and, without the authority, railroad corporations organized separately could not merge and consolidate their interest. But in conferring

the authority the Legislature never intended to compel a dissenting stockholder to transfer his interest because a majority of the stockholders consented to the consolidation. Even if the Legislature had manifested an obvious purpose to do so, the act would have been illegal, for it would have impaired the obligation of a contract. * * * When any person takes stock in a railroad corporation, he has entered into a contract with the company that his interest shall be subject to the direction and control of the proper authorities of the corporation to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribed should be changed in its purpose and character, at the will and pleasure of a majority of the stockholders, so that new responsibilities, and, it may be, new hazards, are added to the original undertaking. He may be very willing to embark in one enterprise, and unwilling to engage in another—to assist in building a short-line railway, and adverse to risking his money in one having a longer line of transit.” *Botts v. Turnpike Co. (Ky.)* 10 S. W. 134, 2 L. R. A. 594; *McCray v. R. Co.*, 9 Ind. 358. The defendant, conceding this to be the law, says that the statute conferring the power upon the several railroad companies consolidating expressly provides for paying the dissenting stockholder the full value of his stock at the time of the consolidation. This provision can only be sustained by invoking the right of eminent domain, and condemning the stock for a public use by making compensation therefor. The plaintiff contends that, at the date of the charter of the Raleigh & Gaston Railroad Company (1835), no power to amend charters of corporations was reserved by the Constitution of this State, and that, under the decisions of this court, they come within the protection of the doctrine of the Dartmouth College Case; that all of the stock was issued prior to the adoption of the Constitution of 1868, by which such power was reserved. He also says that no general statute was in force in this state authorizing such consolidation. This contention is undoubtedly correct. It will be noted, however, that chapter 168, p. 463, Laws 1901, does not undertake to amend the charter of the company, or to do more than empower a majority of the stockholders to consolidate with the other companies. It is an enabling act, and imposes no duty or obligation upon the corporation or its stockholders. It must be conceded, also, that the act of the majority of the stockholders does not change the relation of the plaintiff towards the corporation. The Legislature, in the exercise of its power, confers upon the majority of the stockholders the power to consolidate with the other constituent companies, and accept in consideration therefor such number of shares in the new or consolidated corporation as may be agreed upon. This can be done only with the consent of the Legislature. The Legislature, having decided

that such consolidation was promotive of the public welfare, recognized that it had no power to compel a dissenting stockholder to accept stock in the new corporation. Therefore, in the exercise of the right of eminent domain, it empowers the corporation to condemn the stock of such dissenting stockholder when it cannot otherwise be acquired. This power is entirely distinct from the power to amend the charter. The right of eminent domain which resides in the state is defined to be "the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit as the public safety, necessity, convenience, or welfare may demand." Cooley, Const. Lim. 524; 1 Lewis on Em. Domain, 1; 10 Am. & Eng. Enc. 1048. This right or power is said to have originated in state necessity, and is inherent in sovereignty, and inseparable from it. It is a part of the sovereign power of every state. Id.; Railroad Co. v. Davis, 19 N. C. 451. When the state incorporated the Raleigh & Gaston Railroad Company, a contract was entered into with the corporation, the obligation of which could not be impaired. The state did not, in respect to the property of the corporation or its shareholders, divest itself of, or in any degree impair, its right of eminent domain. The Legislature could not divest itself of a power so essential to the integrity of the state. Mr. Justice Daniel, in West River Bridge Co. v. Dix, 47 U. S. 531, 12 L. Ed. 535, says: "No state, it is declared, shall pass any law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres necessarily the right and the duty of protecting and promoting the interest and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty and in the external relations of the government; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power denominated the 'eminent domain' of the state is, as its name imports, paramount to all private rights vested under the government, and these last are held in subordination to this power, and must yield in every instance to its proper exercise. * * * A correct view of this matter must demonstrate, moreover, that the right of eminent domain in no wise interferes with the inviolability of contracts; that the most sanctimonious regard for the one is perfectly consistent with the possession and exercise of the other." 10 Am. & Eng. Enc. 1050. "The Legislature has the power to authorize the consolidation of railroad and other quasi public corporations, without the unanimous consent of their stockholders, when it makes provision for appraising and paying for the stock of dissenting stockholders.

This power is entirely unaffected by the constitutional prohibition against impairing the obligation of contracts, and is based upon the sovereign power of eminent domain. Corporate shares, as well as other property, are subject to the paramount necessities of the state for the promotion of public interests." Noyes on Intercompany Rel. 51; Black v. Delaware Canal Co., 24 N. J. Eq. 469. "In this busy age of restless activity and enterprise, when the brain of man is exhausting itself in his struggle with time and space, the two forces that most oppose his progress, the taking of private stock in such corporations to advance any of the purposes above indicated must be regarded as the taking of it for public benefit. There can be no doubt that a railroad company may be empowered to extend their road beyond the point to which it was built under the original grant, if proper compensation is provided for stockholders who may resist it; and I can see no difference, in principle, whether the original company, in order to secure a through route under one management, is authorized to take the lands of individuals, or to take the property which individuals have in the stock of an existing road. In the first case, for the purpose of establishing a through route, one kind of private property, to wit, the lands of individuals, are taken by the corporation; in another case another kind of property, to wit, the shares of stock of individuals in an existing company, are authorized to be condemned. * * * The same rule applies to both cases, unless property in stock can claim a superior right to protection. This, with all other private right, is held under the dominant right of eminent domain."

In a very able opinion by Bigelow, J., in *Central Bridge Corp. v. Lowell*, 4 Gray, at page 481, it is said: "Nor is the principle thus recognized any violation of justice or sound policy, nor does it in any degree tend to impair the obligation or infringe upon the sanctity of contracts. It rests on the basis that public convenience and necessity are of paramount importance and obligation, to which, when duly ascertained and declared by the sovereign authority, all minor considerations and private rights and interests must be held in a measure, and to a certain extent, subordinate. By the grant of a franchise to individuals for one public purpose, the Legislature do not forever debar themselves from giving to others new and paramount rights and privileges when required by public exigencies, although it may be necessary, in the exercise of such rights and privileges, to take and appropriate a franchise previously granted. If such were the rule, great public improvements rendered necessary by the increasing wants of society in the development of civilization and the progress of the arts might be prevented by legislative grants which were wise and expedient in their time, but which the public necessities have outgrown and rendered obsolete. The only true rule of

policy, as well as of law, is that a grant for one public purpose must yield to another more urgent and important, and this can be effected without any infringement on the constitutional rights of the subject. If in such cases suitable and adequate provision is made by the Legislature for the compensation of those whose property or franchise is acquired, there is no violation of public faith or private right. The obligation created by the original charter is thereby recognized." We have in the history of the Raleigh & Gaston Railroad Company, a striking illustration of the operation of the principle so clearly stated by Justice Bigelow.

The right to take private property by condemnation proceeding for the purpose of constructing a railroad was first asserted, recognized, and enforced by this court in *R. & G. R. Co. v. Davis*, 19 N. C. 456. *Ruffin, C. J.*, wrote for a unanimous court an able and exhaustive opinion, tracing the power to its source, and giving it the application asserted by the defendant in this case. This opinion has always been cited and approved in this court as settling the law in this state. The same public convenience or necessity which would have justified taking the land of the citizen to open and construct a highway to meet the needs of the public in 1800 was invoked for taking the same land to meet the needs as they existed in 1836 to construct a railroad. The advancing needs and changed conditions in regard to transportation and travel are deemed by the Legislature to demand the formation of a great trunk line or interstate system of railroad in 1901. If the Seaboard Air Line Company had, instead of consolidating with the Raleigh & Gaston Railroad Company, constructed a separate line or track from Ridgeway to Raleigh, every foot of land on the route necessary therefor could have been condemned for that purpose. We can see no reason why, in the exercise of the same inherent sovereign power, the Legislature may not empower the corporation to condemn the plaintiff's stock. Whether the power is in this respect wisely conferred or exercised is beyond our province to say. This is a question for the decision of the Legislature. We have examined with care all of the authorities cited by the plaintiff's counsel. In those cases where the consolidating acts are declared invalid, no provision is made for assessing the value and paying for the dissenting stock. We find no more difficulty in holding that the condemnation of plaintiff's stock is for a public use than did *Ruffin, C. J.*, and his learned associates, in finding that the railroad was originally constructed for such use. *Clark & Marshall on Private Corp.* 1051; *N. C. R. Co. v. C. C. R. Co.*, 83 N. C. 489. We are of the opinion that the Legislature had the power to confer on the corporation the right to condemn the dissenting stock, and that, upon a reasonable interpretation of the statute, it has done so. We find no valid objection to the mode prescribed for ascertaining the

Spencer v. Seaboard Air Line Ry. Co

value of the stock. It is expressly provided that the value so assessed must be paid before the stock is transferred. It would seem that the mode prescribed is exclusive and must be pursued. *Railroad v. McCaskill*, 94 N. C. 751. It seems to us to be the only practicable remedy.

The mode of trial is free from any reasonable objection.

There is another view of this case presented by the defendant's brief which we think fatal to plaintiff's action. The board of directors of the Raleigh & Gaston Railroad Company on April 29, 1901, met and adopted a resolution reciting that the consolidation would greatly facilitate the business and promote the interests of the company, etc. Thereupon a meeting of the stockholders was duly called, and May 20, 1901, fixed as the day for such meeting. Notice thereof was duly served on the plaintiff, and she filed her protest, setting forth that notice of the meeting and the purpose thereof had been served on her. At the meeting she appeared by her attorney and entered her protest. The tellers reported that all of the stock (14,988 shares) represented voted for the consolidation. It appears that the consolidation was entered into by eight separate railroad companies, traversing hundreds of miles, and representing millions of dollars of capital. The consolidation became operative at once, and new stock, common and preferred, to the amount of \$100,000,000, together with bonds secured by mortgage to the amount of many million dollars, were authorized to be issued and executed. It is a matter of general and public information, and known to the court by records before us at each term, the published reports of the Corporation Commission, and other public and official sources, that the consolidation of the roads forming the Seaboard Air Line System has become an accomplished fact; that vast private interests are involved, and public duties assumed. The plaintiff, instead of asserting her rights promptly by an appeal to the preventive jurisdiction of the court, waits more than two years before invoking the equitable power of the court to declare invalid and set aside the consolidation. It is not to be understood that the courts will refuse to protect the rights of a single stockholder, if invaded by the majority, however large, or refuse relief against aggression of consolidated capital, however powerful. The chancellor originally took jurisdiction in many cases because of the inability of the complainant to maintain his suit at law with his adversary, because of his great power and large number of retainers. The question is not whether the plaintiff is without remedy, but, rather, whether the law has given to her an adequate remedy otherwise than by the exercise of the extraordinary power vested in the court. She demands that the court declare the charter of the Raleigh & Gaston Railroad Company forfeited; that the merger and consolidation be declared void as to her; that a receiver be appointed, etc.; that an accounting be had of

Spencer v. Seaboard Air Line Ry. Co

the receipts of the company since the merger etc. It is an elementary principle of equity jurisprudence that relief is granted to the vigilant, and will be refused when there has been unreasonable delay, amounting to laches. This is especially true where valuable rights have been acquired by innocent persons. This familiar principle was announced and enforced by this court in *Pender v. Pittman*, 84 N. C. 372; *Smith, C. J.*, saying, "But this equity ought to be promptly asserted, and not deferred until by a sale other interests may intervene rendering it inequitable, if practicable, to reverse what has been done, and restore matters to their former condition." In that case it was held "that an injunction against carrying out a contract of sale made under a power contained in a mortgage will not be granted when the relief to which the plaintiff considers himself entitled is not sought until the sale has been made and the rights of a purchaser have intervened." Mr. Noyes says: "Acquiescence for an extended period, during which time the interests of third parties have intervened, may itself constitute laches, and prevent a stockholder from attacking a consolidation even on the ground of fraud." *Intercompany Rel.* 49. The authorities upon this subject are uniform and abundant. As was said by Sir John Romilly, Master of the Rolls: "Shareholders cannot lie by, sanctioning, or by their silence at least acquiescing in, an arrangement which is ultra vires of the company to which they belong, watching the result; if it be favorable and profitable to themselves, abide by it and insist on its validity, but, if it prove unfavorable and disastrous, then to institute proceedings to set it aside." *Gregory v. Patchett*, 33 Beav. 595. The proposition is tersely stated by *Van Fleet, V. C.*, in *Rabe v. Dunlap*, 51 N. J. Eq. 48, 25 Atl. 959: "If he wants protection against an ultra vires act, he must ask for it with sufficient promptness to enable the court to do justice to him without doing injustice to others." *McVicker v. Ross*, 55 Barb. 247; *Watts' Appeal*, 78 Pa. 370; *Kent v. Mining Co.*, 78 N. Y. 159.

We think that, in any view of the case, the plaintiff is not entitled to the extraordinary relief demanded. We are at a loss to see how it is practicable to preserve the status of the corporation as she suggests for her benefit. We notice that the defendant, in its answer, says that notwithstanding the failure of the plaintiff to proceed to have the value of her stock ascertained within the time and by the method prescribed by chapter 168, p. 463, Laws 1901, it is now willing to pay her the value thereof. His honor granted to the plaintiff, with the assent of the defendant, the right to amend her complaint and have the value of her stock ascertained. He also directs upon the trial of that issue that the books of the corporation be produced, etc. We think that the order of his honor fully protects the rights of the plaintiff. She will have 30 days from the next term of the superior court to

Peterson v. Middlesex & Somerset Traction Co

amend her complaint and proceed to have the value of her stock ascertained, and judgment rendered therefor.

Upon a full and careful consideration of the record, the agreement of counsel, and the authorities, we find no error in the judgment of his honor. Let it be so certified. No error.

PETERSON v. MIDDLESEX & SOMERSET TRACTION CO. et al.

(Court of Errors and Appeals of New Jersey, Nov. 15, 1904.)

[59 Atl. Rep. 456.]

Ejection of Passenger—Punitive Damages.*

A street railroad company is not liable in punitive damages to a passenger who was wrongfully and with unnecessary violence ejected from a car by the conductor, where it did not participate in the wrongful acts, either by authorizing or approving of them.

Same—Exclusion of Evidence—Acquittal of Conductor.

In an action by a passenger against a street car company for being wrongfully ejected from a car, where plaintiff's evidence tended to show that the ejection was wanton and malicious, but that the defendant company approved of the acts of its conductor by retaining him in its service, it was error to exclude evidence offered by defendant that such conductor was prosecuted criminally for his assault on plaintiff and was acquitted.

Error to Supreme Court.

Action for personal injuries by Alvie Peterson against the Middlesex & Somerset Traction Company and another. From a judgment for plaintiff, defendants bring error. Reversed.

Willard P. Voorhees, for plaintiffs in error.

Theodore B. Booraem, for defendant in error.

GUMMERE, C. J. This writ of error brings up the record of a judgment entered on the verdict of a jury rendered in favor of Peterson, the plaintiff below, and against the defendants, the Middlesex & Somerset Traction Company and Crosson, jointly. Peterson was a passenger upon one of the defendant company's trolley cars, and was rejected from it by Crosson, who was the conductor in charge of the car, for continuing to throw peanut shells upon the floor of the car after being requested to cease from doing so. The ground of action was that the ejection itself was unwarranted, and, further, that it was accompanied by unnecessary and wanton violence.

*As to the right to recover punitive damages for injuries to passengers, see foot-note appended to *McNamara v. St. Louis Transit Co.* (Mo.), 12 Am. & Eng. R. Cas., N. S., 832, 35 Am. & Eng. R. Cas., N. S., 832; foot-note appended to *Chiles v. Southern Ry.* (S. Car.), 12 R. R. R. 750, 35 Am. & Eng. R. Cas., N. S., 750.

As to whether a railroad company is liable for the malicious torts of its servants, see foot-note appended to *Louisville & N. R. Co. v. Routt* (Ky.), 10 R. R. R. 344, 33 Am. & Eng. R. Cas., N. S., 344; foot-note appended to *Riser v. Southern Ry. Co.* (S. Car.), 10 R. R. R. 244, 33 Am. & Eng. R. Cas., N. S., 244.

Although there are numerous assignments of error, but two were considered by counsel for the plaintiffs in error sufficiently meritorious to be worthy of discussion at the argument of the case, and for this reason these only have been considered by the court. The first is directed at a ruling of the trial court excluding testimony offered on behalf of the plaintiffs in error. The second challenges the correctness of the instruction of the court to the jury on the subject of punitive damages.

The instruction complained of was as follows: "A corporation is an imaginary being. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands, and these minds and hands are its servants' minds and hands; and it is responsible when its servants' minds and hands perpetrate acts of a wanton, reckless, and malicious character, for the damages which result therefrom, and in that case punitive or punishment damages may be assessed against it by the jury as part of the verdict." This instruction was in contravention of the rule laid down in the reported decisions of our courts, which limits the liability to respond in punitive damages to the actual wrongdoer, and excludes from such liability those who are only consequentially responsible for the wrongdoer's act on account of their relation to him, unless they participate in it expressly or impliedly, by conduct authorizing or approving, either before or after it was committed. This rule first finds clear expression in the decision of the Supreme Court in the case of *Haines v. Schultz*, 50 N. J. Law, 481, 14 Atl. 488. It was the basis of decision by that court in the case of *Fohrmann v. Consolidated Traction Co.*, 63 N. J. Law, 391, 43 Atl. 892, and was adopted by this court in the case of *Haver v. Central R. Co.*, 64 N. J. Law, 312, 45 Atl. 593. It is argued that the case of *Hoboken Printing Co. v. Kahn*, 59 N. J. Law, 218, 35 Atl. 1053, 59 Am. St. Rep. 585, is in opposition to the authorities just referred to, but an examination of the opinion in that case will show that the argument is without support. The facts were these: The defendant company had published a libel against Kahn. The day following its publication, Kahn called upon the managing editor and demanded a retraction of the charge made against him in the libelous article. Instead of complying with his demand, a subsequent issue of the defendant's newspaper printed a practical reiteration of the original libel. It was contended on behalf of the defendant company that under the rule laid down in *Haines v. Schultz*, supra, exemplary damages could not be assessed against it. This court held that the rule in the cited case was not applicable on the facts which the case then before it presented, and that it was thereof unnecessary to consider whether the doctrine of the *Haines Case* was sound. The distinction between the two cases is apparent. In the *Haines Case*, which was

also a libel suit, the article complained of emanated from a reporter in the defendant's employ, and was published in his newspaper without his authority or knowledge. Nothing by way of approval of his employee's act was done by him after the publication was brought to his attention. In *Hoboken Printing Co. v. Kahn*, after the attention of the managing editor was called to the libelous article, instead of a disavowal of responsibility for it, there was a practical republication of the libel; and this was manifestly the act of the managing editor. He was the executive head of the corporation—its representative in accepting or disavowing the act of a subordinate employee; and, unless the act of such an officer is treated as the act of the corporation, when the question of approving or disavowing the act of a subordinate employee is presented, the rule which holds a master liable to respond in punitive damages for the malicious and wanton act of his servant, when that act receives the approval of the master, has no application where the master is a corporation, for it can only act through officers selected to represent it. No case can be found which holds such a doctrine. *Haines v. Schultz*, *Fohrmann v. Consolidated Traction Co.*, and *Haver v. Central R. Co.* are the converse of *Hoboken Printing Co. v. Kahn*. In each of the former cases it was held that, because there was nothing to show that the master participated in the malicious and wanton act of the servant, by either authorizing it before or approving it after it was done, punitive damages could not be assessed against him, while in the *Kahn* case the conduct of the managing editor was such an approval of the malicious and wanton act of the person responsible for the original publication as to justify the assessment of exemplary damages against the defendant.

The other assignment of error was directed at the exclusion by the trial court of evidence going to show that the plaintiff had lodged a criminal complaint against the defendant Crosson for the alleged assault which was the foundation of this action, that this complaint was followed by an indictment by the grand jury, and that the trial had on that indictment resulted in the acquittal of Crosson. It had already appeared in the case that Crosson had been retained in the employ of the defendant company notwithstanding his ejection of the plaintiff from his car, and the testimony was offered to rebut the presumption that by doing so the company had ratified or approved the alleged malicious and wanton assault committed by its employee. We think the testimony was improperly excluded. The question whether the retention by a master of a servant who had injured a third person by a wanton and malicious act will, standing alone, support the conclusion that the servant's act has received the approval of the master, has never been passed upon by this court. The defendant company was for this reason entitled

Morgan v. Lake Shore & M. S. Ry. Co

to put in any evidence which would naturally tend to rebut such a presumption.

The erroneous exclusion of the evidence referred to, as well as the error in the charge to the jury, were harmful to the Middlesex Traction Company alone, and afford no ground of reversal so far as the defendant Crosson is concerned. But the judgment brought up by the writ is against both defendants jointly. It is an entirety—indivisible. Consequently there cannot be a reversal in part and an affirmance in part. *Richards v. Walton*, 12 Johns. 434; *Arnold v. Sanford*, 14 Johns. 417; *Holbrook v. Murray*, 5 Wend. 161; *Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356; *Gaylord v. Payne*, 4 Conn. 190.

The judgment under review should be reversed in toto.

MORGAN v. LAKE SHORE & M. S. RY. CO.

(Supreme Court of Michigan, Dec. 30, 1904.)

[101 N. W. Rep. 836.]

Review—Error Not Assigned.

A question which is not referred to in any assignment of error is not presented by the record on a writ of error, and therefore will not be considered, though sought to be raised in the argument.

Injury to Passenger—Contributory Negligence—Standing on Platform to Get Fresh Air.*

Comp. Laws, § 6303, provides that if a passenger is injured while on the platform of a car, in violation of the regulations of a railroad company, the latter shall not be liable if the injury was occasioned by his being improperly on such platform, provided room and seats inside were sufficient for the accommodation of passengers: *held*, that where all seats were occupied, and a passenger became faint from conditions existing as a result of the company's negligence, and, as he could not get to a window to relieve his faintness, sought to get fresh air on the platform, he was not guilty of contributory negligence as a matter of law.

Same—Speed of Train—Pleading.

A declaration against a railroad company for injury to a passenger who fell from the platform of a crowded car, which place he had sought to relieve his faintness, alleged that while he was standing at said door holding on to the hand railing he became unconscious by reason of the foul air, and fell from said train while the same was running at a high rate of speed, and struck with great force on the ground: *held* a sufficient averment that the speed of the train caused him to fall therefrom.

Hooker and Grant, JJ., dissenting.

Error to Circuit Court, Lenawee County; Guy M. Chester, Judge.

Action by Marion L. Morgan against the Lake Shore &

*As to whether it is contributory negligence to ride on the platform of a car, see foot-note appended to *Brunnchow v. Rhode Island Co.* (R. I.), 12 R. R. R. 512, 35 Am. & Eng. R. Cas., N. S., 512.

Morgan v. Lake Shore & M. S. Ry. Co

Michigan Southern Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Weaver, Morgan & Priddy, for appellant.

Bird & Sampson, for appellee.

MOORE, C. J. The plaintiff recovered a judgment for injuries received by him while a passenger on defendant's road. The case is brought here by writ of error.

There is scarcely any dispute about the facts. Plaintiff resides near Woodstock station on the Ypsilanti Branch of the Lake Shore & Michigan Southern Railway. The defendant advertised an excursion at reduced rates for the Hillsdale fair in 1901. On the last day of the fair, plaintiff purchased a round-trip ticket to Hillsdale and return, good for that day only. On the way to Hillsdale in the morning there were eleven coaches. On the return trip there were only five coaches in the train, and plaintiff claims that all the seats were occupied, and people were standing in the aisles and upon the platforms; that he made his way up onto the rear platform of the fourth car, and when the train started he stepped into the rear end of the coach, and found standing room near the door; that the car in which he stood was badly crowded, men were smoking in the car, and it was hot, the ventilation was poor, and by the time the train had proceeded three or four miles he felt sick, and thought he would faint, and, not being able to get near a window, he opened the door, and stepped out on the platform. Thinking that riding backwards might increase his sickness, he stepped across on the opposite platform, and turned his back to the end of the car, leaned against it, and held onto the hand rail. He stood in this position for a few moments, when he lost consciousness, and rolled down the steps and off onto the ground. He also claims the train was running upwards of 40 miles an hour.

The only question involved here is whether the plaintiff, as a matter of law, under all the circumstances, was guilty of contributory negligence in going out upon the platform to relieve his sickness. The plaintiff claims he was not. The defendant insists he was, and that a verdict should have been directed in its favor.

Before discussing this question it is proper that we should say that we are not at liberty on this record to consider the questions of defendant's negligence, and of whether that negligence was the proximate cause of plaintiff's injury. These questions were not raised in the lower court. The question of defendant's negligence is not raised in this court. The question of that negligence being the proximate cause of plaintiff's injury is raised in this court only in this way: "In no view of this case can it be said that any alleged act of the defendant was the proximate cause of the accident to the plaintiff. The sole cause of the accident to plaintiff was his

Morgan v. Lake Shore & M. S. Ry. Co

own act in leaving a place of safety within the coach and assuming a perilous position on the outside." We are referred to no assignment of error to which this argument is applicable, and diligent search on our part has enabled us to find none. We therefore conclude, as heretofore stated, that this question is not presented by the record. In deciding this case we therefore assume that while plaintiff was on the platform he was injured in consequence of defendant's negligence—negligence which was the proximate cause of his injury.

The question then presented for our determination is whether, under the circumstances, plaintiff was negligent in leaving the car and going on the platform, so as to bar his recovery for an injury there received as a direct consequence of defendant's negligence. It must be confessed there is a want of uniformity in the decisions as to whether a person should be chargeable, as a matter of law, with contributory negligence, in going out upon the platform when no seat was furnished him in the car. The New York court has held that in going upon the platform, where the company failed to furnish a passenger a seat, he was not, as a matter of law, chargeable with contributory negligence. *Willis v. Ry. Co.*, 34 N. Y. 670. The Wisconsin court has held that where a passenger voluntarily goes upon a platform, where no seat is furnished him, it is a question for the jury to say whether he was guilty of contributory negligence. *Ward v. Ry.*, 78 N. W. 442. The Minnesota court has held—and this holding has been followed by several other states—that where a passenger voluntarily goes out upon the platform, where no seat is provided for him, but there is standing room in the car, he is guilty of contributory negligence as a matter of law. *Rolette v. Great Northern Ry. Co.*, 97 N. W. 431.

It is the claim of defendant that the last case mentioned is sustained by the great weight of authority, and should control; citing many cases, and especially *Railway Co. v. Moneyhun*, 146 Ind. 147, 44 N. E. 1106, 34 L. R. A. 141, which it is claimed is a parallel case to the one at bar. While the case resembles this one in many respects, it may be distinguished in some important particulars. It appears from the opinion in *Railway Company v. Moneyhun*, supra, that the record does not disclose what made the plaintiff sick. It also appears "he was not content to stop on the platform, but went upon the lower step, and stood there with his back towards the platform and his head leaning forward." The court was of the opinion that the facts disclosed a clear case of contributory negligence, and so held. In our view of the case we do not need to decide which of these lines of cases is sustained by the weight of authority. All of them recognize the rule that, if the passenger is necessarily on the platform because of conditions created by the railway company, he is not precluded from recovering damages.

Section 6303, Comp. Laws, reads: "In case any passenger on any such road shall be killed or injured while on the platform of a car or while in or on any baggage or freight car in violation of the printed regulations of the company posted up at the time, in a conspicuous place inside its passenger cars then in the train, such company shall not be liable for the injury, if the injury be occasioned by the person being improperly on such platform, or within such baggage or freight car, or after having been notified by the conductor or any other person having charge of any train that such person is not in the proper place: provided, such company at the time furnished room and seats inside of its passenger cars sufficient for the proper accommodation of its passengers."

This statute clearly recognizes, by inference at least, that conditions may arise where one would be entitled to recover, even though he was riding upon the platform. There was testimony in the case from which the jury might find, not only that the cars were so crowded that all the seats were occupied, but from which they might easily draw the inference that the passenger became faint because of the conditions existing as the result of negligence on the part of the defendant, and, as he could not get to a window to relieve his faintness, he sought what is usually an effective remedy, fresh air, at the only place he could find it. We do not think it can be said, as a matter of law, that this was contributory negligence.

It is said: "It was error for the court to charge the jury where the court states, 'and you find that plaintiff was thrown off the platform onto the ground and injured by reason of such sickness so caused, and by reason of the speed of the train—that is, the high rate of speed of the train over this track—or the tipping of the platform on a curve in the track, then plaintiff would be entitled to recover.' And we submit there was no testimony that would justify this charge as to the high rate of speed as affecting plaintiff's falling from the train. Nor is there any allegation in the declaration that the speed of the train was in any manner the cause of plaintiff falling from the train." The question of the high rate of speed being negligence was not raised. We think there was testimony of the high rate of speed. We also think the following averment was sufficient: "That while he was standing at said door, holding onto the hand railing on the end of the car, he became and was unconscious by reason of said foul and unwholesome air, and fell from said train while the same was running at a high rate of speed, and struck with great force on the ground."

Judgment is affirmed.

CARPENTER and MONTGOMERY, JJ., concurred.

JEVONS *v.* UNION PAC. R. CO.

(Supreme Court of Kansas, Dec. 1, 1904.)

[78 Pac. Rep. 817.]

Ejection of Passenger—Mistake in Punching Ticket—Liability.*

Where a railroad ticket correctly recites the date of its issuance, but is marked with a punch in a manner that, according to its printed statements, indicates that it had expired prior to that date, it cannot be said as a matter of law that it is for this reason void, and that its holder may not recover damages for being expelled from a train when he presents it for passage.

Directing Verdict.

Oral evidence in support of an affirmative defense, even if not contradicted, will not authorize a trial court to direct peremptorily a verdict for the defendant.

Return Trip Ticket—Transfer—Rights of Holder.

A round-trip railroad ticket, containing provisions that it shall be used only by the original holder whose signature it bears, but not in fact signed by any one, which is sold with the express understanding that it shall be used by A. in going to, and by B. in returning from, the place of destination, is not void when presented by B. upon such return passage, after having been used by A. for the first part of the journey.

(Syllabus by the Court.)

Error from District Court, Clay County; Sam Kimble, Judge.

Action by Inez Jevons against the Union Pacific Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Waters & Waters and R. C. Miller, for plaintiff in error.

N. H. Loomis, R. W. Blair, and H. A. Scandrett, for defendant in error.

MASON, J. Inez Jevons sued the Union Pacific Railroad Company for damages arising from her ejection from one of defendant's trains. A demurrer to the plaintiff's evidence was overruled, but after the evidence of both parties had been received the court peremptorily directed a verdict for defendant, upon which judgment was rendered, from which the plaintiff now prosecutes error.

The evidence in behalf of the plaintiff was to this effect: On July 9, 1900, her father, W. P. Gates, applied to defendant's ticket agent at Wakefield for two tickets from that point to Kansas City and return, one to be used by himself for the round trip, and the other to be used for passage to Kansas City by his wife, and for the return trip by his daughter, the plaintiff. He was given two tickets, represented as being adapted to his purpose, and good for use at any time within 30 days. Upon the face of each, with other matter, the following was printed: "This ticket is sold at a reduced

*See foot-note appended to *Brown v. Rapid Ry. Co.* (Mich.), 9 R. R. R. 802, 32 Am. & Eng. R. Cas., N. S., 802.

rate, and the purchaser accepts it subject to all the conditions on the face, back, and going coupon hereof, and its acceptance and use is an acceptance of each and every of said conditions. If this ticket or contract bears no cancellation or stamp other than the ordinary dating stamp, the holder is entitled to a first class passage at any time within thirty days from the date of sale stamped on the back hereof. If this ticket has 'L' punch on margin it is purchased and issued as a limited ticket, and it is expressly agreed that it will be used for passage by the purchaser within the date canceled by 'L' punch in margin, and will be void after said date, and will not be honored under any circumstances after the expiration of thirty days from date stamped on back." Figures on the margin representing the year 1900, the month of July, and the 5th day of the month, were perforated with a punch shaped like the letter "L." On the back was a stamp reading: "Issued by the U. P. Railroad Co. July 9, 1900. Wakefield, Kans." The tickets (although not signed by any one) also bore the words: "This ticket is not transferable, and if presented by any other than the original holder, whose signature is hereon, the conductor will take it up and collect full fare." On these tickets Gates and his wife rode to Kansas City. The conductor to whom they were presented told Gates that they were dated wrong, and that he had better have them fixed, but did not tell him that they would not answer for the return trip without change. Gates understood that what was meant was merely that, as the tickets stood, they must be used within 30 days from July 5th, whereas they should have been good for 30 days from July 9th; but, as he intended returning before the time would expire on either basis, he considered it unnecessary to have any correction made, and dismissed the matter from his mind. On July 17th Gates and the plaintiff took the defendant's train at Kansas City for Wakefield. The plaintiff tendered one of the tickets to the conductor, who refused to honor it, and required her to leave the train. The evidence introduced by defendant tended to show that the "L" punch marks on the tickets were the result of a mistake on the part of the agent who sold them; that he had punched a number of tickets in anticipation of a large demand on the Fourth of July, and by inadvertence sold two of these to Gates; that the matter was fully explained to and understood by Gates at the time of his trip to Kansas City, and that he was instructed how to have the error corrected while at that place.

The defendant in error claims that the case falls within the rule announced in *Rolfs v. Railway Co.*, 66 Kan. 272, 71 Pac. 526, that a railroad ticket containing a full and unambiguous printed contract is conclusive evidence to the train conductor to whom it is presented as to the rights of the passenger, and that consequently no action for damages will lie for a refusal to honor such a ticket after the expiration of the time limit

Jevons v. Union Pac. R. Co

fixed by its own terms, irrespective of any statements that may have been made by the company's agent at the time of the sale of the ticket. But the facts stated show that the present case is not within the letter or spirit of the rule stated. The ticket in question did not contain a plain and unambiguous contract. Nor did it contain a contract that was ambiguous merely because of stating two different periods of limitation. The stamp upon the back of the ticket performed two functions. It not only fixed the date from which the 30-day limit was to be computed, but it also showed, by the express declaration of the company issuing it, the time of its sale, July 9th. If the theory of the company is correct—that the "L" punch in the margin plainly indicated that the ticket was of no validity unless presented prior to July 5th—then no contract whatever was expressed, for an undertaking made on July 9th to carry a passenger prior to July 5th cannot be called a contract. If the plaintiff is by the terms of the ticket precluded from recovery, it is not because her ticket showed a different contract from that which she was seeking to have enforced, but because it must be said that the ticket, while attempting to state a contract, was a nullity on its face, that she was bound to take notice of that fact, and that therefore she could not base a right of carriage upon it.

We do not think the plaintiff should be required to suppose that the ticket issued by the railway company was meaningless. One possible grammatical construction of the sentence relating to the effect of the punch marks would make their presence an indication that the ticket could not be used under any circumstances after the expiration of 30 days from the date of its issuance. But she was not bound to find a meaning for them. Since they could not possibly have been intended to forbid the use after July 5th of a ticket issued July 9th, she was justified in regarding them as having been made by inadvertence or without definite purpose, or as having been waived or abandoned. So with the conductor to whom the ticket was presented. If he gave credence to the dating stamp—and he was bound to do so, since it was genuine—he must have known that the ticket could not have expired July 5th, and that, whatever might be the explanation of the punch marks, they could not have been deliberately made with the purpose of limiting its use to that date. It cannot be said that he was required to decide between two inconsistent dates, that both could not be correct, and that there was no sufficient reason for his crediting the one indicated by the stamp rather than the one indicated by the punch mark; for, as already suggested, the words stamped on the back of the ticket, in addition to forming a part of the contract, constitute a plain, unambiguous, unequivocal declaration of the date on which it was issued. Granting that the language printed on the face of the ticket, aided by the marks of the "L" punch, was as unequivocal a declaration

that the ticket would be void after July 5th, the issuance of the ticket at a later date was conclusive evidence that such declaration had been abandoned. Assuming the facts to be as claimed by plaintiff, the conductor should have acted upon such evidence and honored the ticket. In this respect the situation is somewhat similar to one that arose in *Laird v. Traction Co.*, 166 Pa. 4, 31 Atl. 51. A street railroad transfer slip recited that it was good for but 10 minutes after being punched, the time being indicated by the position of the punch mark. When offered for passage it bore two punch marks, and it was held that the conductor was bound to recognize that designating the later hour.

In *Trice v. Chesapeake & O. Ry. Co.*, 40 W. Va. 271, 21 S. E. 1022, a mileage ticket was sold March 4, 1903, but by mistake was dated March 4, 1904. It recited that it was good for a year from its date, but also that it expired March 4, 1904. It was presented for passage in April, 1903, and refused. The holder was ejected, and brought action for damages. For the reasons already stated, the situation was less favorable than that here presented to the claim of the passenger. The court said: "In the *McKay Case*, 34 W. Va. 65, 11 S. E. 737, 9 L. R. A. 132, 26 Am. St. Rep. 913, we held that where a railroad company agreed to sell a ticket for passage between certain points, but by mistake wrote the ticket for passage to the other points, the passenger could not ask passage where the ticket did not carry him, it being apparently not good for the passage demanded; and the passenger leaving the car at the command of the conductor, but without force, could not sue in tort, but must sue for the breach of contract by the company in agreeing to carry him that passage, and failing therein by not giving him the ticket contracted for. That case was confessedly somewhat close, but I still think it was rightly decided, and sustained by cases of eminent authority. There the ticket showed nothing for, and all against, the right of the passenger to ride, which he claimed, and was transparently not good—a mere blank or nullity, as to the ride claimed; while here it is apparently good, more apparently good than bad, and turning out in the end to be good. There is a difference, though it cost reflection to see it. In this case I go upon the theory, which I think is correct, that the plaintiff's grievance is not a breach of contract in agreeing to sell him a ticket for a certain passage, and giving him a wrong ticket, as in the *McKay Case*, but in the fact that he had a ticket entitling him to go to Huntington as he demanded, and in its wrongful rejection and his expulsion. He had a ticket turning out ultimately to have been good from the start. The confusion as to date arising from the agent's error, without fault in the passenger, does not change its validity."

A further argument is made that the case was rightly taken from the jury because it was shown beyond question

Fisher v. Seaboard Air Line Ry. Co

that Gates, during the trip to Kansas City, was fully advised of the necessity for having the ticket corrected before being presented for the return passage. Strong evidence to that effect was presented by the defendant, some of which was not denied in express terms, if at all. But this was offered in support of an affirmative defense, the burden of proving which was upon defendant, and it cannot be said, as a matter of law, that the jury were bound to accept the evidence as true, even if not contradicted. *A. T. & S. F. Ry. Co. v. Geiser*, 68 Kan. —, 75 Pac. 68.

A final contention of defendant in error is that the plaintiff was not entitled to use the ticket in question by reason of the provision already quoted in full as to its being nontransferable. But no name of the holder appeared upon the ticket, and, according to the plaintiff's evidence, it was sold for the express purpose of being used by her for the passage from Kansas City to Wakefield. Under these circumstances it cannot be said that the provision of the contract referred to was violated, notwithstanding the fact that the ticket had been used by another person for the trip from Wakefield to Kansas City. The ticket was issued as much for plaintiff's use as for that of any one else.

The judgment is reversed, and a new trial ordered. All the Justices concurring.

FISHER v. SEABOARD AIR LINE RY. CO.

(Supreme Court of Appeals of Virginia, Jan. 28, 1904.)

[46 S. E. Rep. 281.]

Injury to Adjoining Property—Destruction of Its Property by Railroad—Negligence—Pleading.

A count in a complaint alleging that defendant acquired a house adjoining plaintiff's tenement, and, contriving to disturb and injure defendant, pulled down and carried away the building on its lot in such a manner that the partition wall separating defendant's property from plaintiff's, with communicating doors, was left unprotected, exposed, etc., by reason of which plaintiff's tenement was greatly injured, was demurrable, since defendant, being the owner, was entitled to pull down its property, and, if its acts were negligently done, acts of negligence were not alleged.

Same—Operation of Railroad—Right to Recover.*

Where a railroad company, under its charter, was authorized to maintain and operate a railroad adjoining plaintiff's property, plaintiff was not entitled to recover for annoyance consisting of noise, smoke, etc., caused by the operation of the railroad, unless such annoyance was the result of negligence in such operation.

Same—Joinder of Causes of Action.

Where plaintiff claimed damages for injuries to his tenement by reason of the negligence of a railroad company in tearing down an adjoining tenement belonging to it, to make room for its tracks, and

*See extensive note appended to *Louisville & N. Terminal Co. v. Lillyett* (Tenn.), 15 R. R. R. 498, 38 Am. & Eng. R. Cas., N. S., 498.

Fisher v. Seaboard Air Line Ry. Co

for injuries by reason of smoke, noise, etc., resulting from the negligent operation of the railroad, such causes of action were of the same nature, and might properly be joined in the same declaration.

Error to Law and Equity Court of City of Richmond.

Action by Harris Fisher, as trustee, etc., against the Seaboard Air Line Railway Company. From a judgment sustaining demurrers to the declaration, plaintiff brings error. Reversed.

A. W. Patterson and John H. Ingram, for plaintiff in error.
Munford, Hunton, Williams & Anderson, for defendant in error.

KEITH, P. This action was instituted by Harris Fisher, trustee for his wife, Ester Fisher, in the law and equity court of the city of Richmond, to recover damages against the defendant company. There were six counts in the declaration, and the defendant company having demurred to each count, and to the declaration as a whole, a judgment was entered sustaining the demurrer and dismissing the case.

It is conceded by counsel for defendant in error that the court erred in its judgment with respect to the first and second counts. We shall therefore limit our consideration to the third, fourth, fifth, and sixth counts.

The third count is as follows:

"And for this also, to wit, that the said plaintiff being the owner in fee simple of a certain other store and dwelling house (fully described in the first count, above), the said defendant afterwards, to wit, on the 10th day of July, 1899, acquired the western tenement of said mansion house, and, well knowing the premises, and contriving to disturb and injure the said plaintiff in the peaceable and lawful enjoyment of his said land with its appurtenances, did thereafter, to wit, on the 1st day of September, 1899, pull down and carry away the building upon its lot in such manner that the partition wall, with communicating doors, between said two houses, was left unprotected, exposed, and in a most unsightly condition, by means whereof the plaintiff's said tenement has been greatly injured and depreciated in value."

The act complained of in this count is one which the defendant had a right to do. It was the owner of the building which it pulled down, and its liability, if any, results from its doing a lawful act in an unlawful or negligent manner. We are of opinion that the acts constituting negligence are not sufficiently stated in this count, and that the demurrer to it was properly sustained.

The same observations will hold good with respect to the fifth count. The defendant had the right to run its trains, but if it ran them so unskillfully, negligently, or carelessly as to injure the plaintiff, it would be responsible for such damages as might ensue. But the acts of negligence and carelessness should be stated with such reasonable certainty as to enable the defendant to make defense thereto.

Fisher v. Seaboard Air Line Ry. Co

The chief controversy in this case is with respect to the fourth and fifth counts, which are as follows:

"And for this also, to wit, that the said plaintiff being the owner of a certain other store and dwelling house (as described in first count, above) of great value, to wit, of the value of \$10,000, the defendant, well knowing the premises, but contriving, etc., thereafter, to wit, on the 1st day of September, 1899, erected and built upon its said lot, in immediate proximity to the aforesaid store and dwelling of said plaintiff, to wit, within 8 feet thereof, a high trestle, to wit, of the height of 25 feet, which, approaching from the rear, curves around and runs along the entire length of the plaintiff's premises; and the said plaintiff further says that afterwards, to wit, on the 27th day of May, 1900, the said defendant began running cars, trucks, trains, and locomotives over and upon the said trestle, and that the running of same has steadily increased and continued from thence to the bringing of this suit; and he avers that the movement of these trains and locomotives on said trestle is an insufferable nuisance, owing to the many horrible noises, the jarring of the ground and shaking of the buildings, and the volumes of smoke and dust so created and emitted, whereby the walls of said building have been cracked and displaced, the air in and about the said plaintiff's premises so polluted as to sensibly impair the enjoyment thereof, and the ordinary comfort of human existence therein otherwise materially interfered with; in consequence of all which the said plaintiff says that said dwelling house has been entirely vacated, and the tenant of his store has given notice of a like intention to move at the expiration of his lease; that said property has thus been greatly injured, and is now of little or no value whatever to the plaintiff.

"And for this also, to wit, that the said plaintiff being so seised and possessed of another store and dwelling house [fully described in the first count of this declaration], of great value, to wit, \$10,000, the defendant, well knowing the premises, but contriving to injure and disturb the said plaintiff in the peaceable and lawful enjoyment of his said property, heretofore, to wit, on the 1st day of September, 1899, and on divers other days between that date and the bringing of this suit, so unskillfully, carelessly, and negligently ran its trains and locomotives along and upon the trestle of defendant adjacent to said plaintiff's premises aforesaid that the latter were and are greatly injured thereby, and in consequence thereof the said property has become and is of little or no value to said plaintiff."

It will be seen that the defendant is not charged with having taken any part of the plaintiff's property. It appears that the defendant in error, a duly chartered and incorporated railway company, built upon its own property, within 8 feet of the dwelling of the plaintiff, a trestle 25 feet

in height, which, approaching from the rear, curves around and runs along the entire length of plaintiff's premises; that upon and over this trestle the cars of the defendant, drawn by locomotives, were from and after the 27th day of May, 1900, to the bringing of this suit, continuously and with increasing frequency operated; and that the movement of these trains and locomotives constituted an insufferable nuisance, owing to the noise which they occasioned, the volumes of smoke and dust created and emitted, polluting the atmosphere, and the jarring of the ground and shaking of the buildings, impairing the enjoyment thereof, and as a consequence the tenant had given notice of his intention to move at the expiration of his lease, and the property has been so injured as to be now of little or no value. The sixth count presents the same question.

Pollock on Torts, pp. 154-156, treating of this subject, says: "* * * A man cannot be held a wrongdoer, in a court of law, for acting in conformity with direction or allowance of the supreme legal power in a state. In other words, 'no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to any one.' The meaning of the qualification will appear immediately. Subject thereto, 'the remedy of the party who suffers the loss is confined to recovering such compensation (if any) as the Legislature has thought fit to give him.'

"* * * Apart from the question of statutory compensation, it is settled that no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner. A person dwelling near a railway constructed, under authority of Parliament, for the purpose of being worked by locomotive engines, cannot complain of the noise and vibration caused by trains passing and repassing in the ordinary course of traffic, however unpleasant he may find it, nor of damage caused by the escape of sparks from the engines, if the company has used due caution to prevent such escape as far as practicable."

In *Vaughan v. Taff Vale Railway Co.*, 5 H. & N. 679, the court said: "A railway company authorized by the Legislature to use locomotive engines is not responsible for damage from fire occasioned by sparks emitted from an engine traveling on their railway, provided they have taken every precaution in their power and adopted every means which science can suggest to prevent injury from fire, and are not guilty of negligence in the management of the engine."

And Chief Justice Cockburn uses the following language: "Yet, when the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature

Fisher v. Seaboard Air Line Ry. Co

carried with it this consequence that if damage results from the use of such thing, independently of negligence, the party using it is not responsible."

This case was approved in *Hammersmith, etc., Ry. Co. v. Brand*, reported in 4 English & Irish App. Cases, 171, where Mr. Justice Blackburn says: "I think it is agreed on all hands that if the Legislature authorizes the doing of an act which, if unauthorized, would be wrong and a cause of action, no action can be maintained for that act, on the plain ground that no court can treat that as a wrong which the Legislature has authorized, and consequently the person who has suffered a loss by the doing of that act is without remedy, unless in so far as the Legislature has thought it proper to provide for compensation to him. He is, in fact, in the same position as the person supposed to have suffered from the noise of traffic on a new highway is at common law, and subject to the same hardship. He suffers a private loss for the public benefit."

The Supreme Court of the United States is to the same effect. In *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336, the court said: "That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes. We refer to an action at common law, such as this. A Legislature may, and often does, authorize and even direct acts to be done which are harmful to individuals, and which, without the authority, would be nuisances; but in such a case, if the statute be such as the Legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. In such grants of power a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer, but then the right is a creature of the statute. It has no existence without it. If this were not so, the suffering party would be entitled to repeated actions, until an abatement of the erections would be enforced, or perhaps he might restrain them by injunction." See, also, *Uline v. N. Y. Cent. R. Co.*, 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661; *Sawyer v. Davis*, 136 Mass. 229, 49 Am. Rep. 27; *Heiss v. Railroad Co. (Wis.)* 34 N. W. 916; *Randle v. Pac. R. Co.*, 65 Mo. 325.

The decisions of this court are in harmony with these cases. In *James River & Kanawha Canal Co. v. Anderson*, 12 Leigh, 278, the court held that an injunction would not lie at the instance of a property owner, whose lands did not abut upon the street at the point at which the defendant was excavating, to enjoin the prosecution of the work. Judge Allen, at page 305, after alluding to the fact that the company had encroached upon the street, said: "Was the company authorized by its charter to make this encroachment? For, if it was, then, whatever injury may ensue to the property holders on the street, an injunction cannot be awarded."

In *Richmond Traction Co. v. Murphy*, 98 Va. 104, 34 S. E.

982, the tracts of the railroad company were laid in Broad Street, in the city of Richmond, in front of a portion of a lot owned by Murphy. The track, as it left Murphy's lot, came close to the sidewalk, approaching the property line of the property owners abutting on the street, and immediately adjacent to the property of E. P. Murphy. By agreement, condemnation proceedings were had; and the commissioners reported that for the taking of the property of Murphy, and for damage to the residue of his lot by reason of the construction of the railroad in the street immediately in front of his property, he was entitled to \$1,000, and further reported that, if he was entitled to damages by reason of the construction of the track immediately in front of the property adjacent to his lot, then he should be given \$1,000 additional. But the court said he was entitled to the sum of \$1,000 for the taking of his property, but that the injury done to his property by the construction of the railroad in front of the property adjacent to his lot was *damnum absque injuria*, and therefore no compensation could be allowed him.

Upon an appeal to this court, Judge Harrison delivered the opinion, saying: "To hold that each abutting lot was impaired in value by reason of the location of the road beyond its limits, and that the owner was entitled to receive compensation therefor, would so multiply the damages to be paid as to amount to a denial of the right to construct the road." See, also, *Smith v. City Council of Alexandria*, 33 Gr. 208, 36 Am. Rep. 788; *Home, etc., Co. v. City of Roanoke*, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551.

Meyer v. City of Richmond was a suit brought to recover damages against the Chesapeake & Ohio Railway Company and the city of Richmond for damages caused to the property of the plaintiff by the obstruction of the street upon which plaintiff's property abutted, caused by tracks, sheds, and fences of the railroad company built under authority of its charter, and with the assent of the city of Richmond, by which travel along the street was arrested, and the property rights of petitioner as an abutter on said street were practically destroyed. It appears, however, that the structures complained of did not touch the property of the plaintiff. A judgment was entered in the law and equity court of the city of Richmond for the defendant, and to that judgment a writ of error was denied by this court. The case was afterwards carried to the Supreme Court of the United States upon the ground that Meyer had been deprived of his property without due process of law. The Supreme Court took jurisdiction of the case, but ultimately affirmed the decision of this court. 19 Sup. Ct. 106, 43 L. Ed. 374. In the course of the opinion the court said: "The substantial thing is not that one may be damaged by an obstruction in a street—not that one may be specially damaged beyond others—but, is such damage a deprivation of property, within the meaning

Fisher v. Seaboard Air Line Ry. Co

of the constitutional provision? According to the Virginia cases, an additional servitude may be said to be another physical appropriation, and hence another taking, and must be compensated. But the plaintiff's case is not within this doctrine, nor is there anything in the decisions of Virginia which makes consequential damages to property a taking, within the meaning of the Constitution or that state. Decisions in other states we need not resort to or review."

After reviewing a large number of cases from this and other states, the court held that consequential damage to property by an obstruction in a street is not a deprivation of the property, within the constitutional provision against depriving a person of property without due process of law.

We do not think that the demurrer should have been sustained because of the improper joinder of various and distinct causes of action accruing at different times, and resulting in different species of alleged injuries. Indeed, this ground of demurrer was not insisted upon in the argument, and is clearly not well taken. "Wherever causes of action are of the same nature, and the same judgment is to be given in all, they may be joined in one declaration." 4 Minor's Inst. (3d Ed.) 1160.

We are of opinion that the third, fourth, fifth, and sixth counts were all demurrable, for the reasons assigned—with respect to the third and fifth, because the acts of negligence were not stated with reasonable certainty; and with respect to the fourth and sixth, because, as stated, the acts charged upon the defendant were authorized by its charter. But in order to secure this immunity, the power conferred by the Legislature must be exercised without negligence, with judgment and caution. For damage which could not have been avoided by any reasonable, practicable care on the part of those authorized to exercise the power, there is no right of action; but they must not do needless harm, and, if they do, it is a wrong against which the ordinary remedies are available. "If an authorized railway comes near my house, and disturbs me by the noise and vibrations of the trains, it may be a hardship to me, but it is no wrong. For the railway was authorized and made in order that trains might be run upon it, and, without noise and vibrations, trains cannot be run at all. But if the company makes a cutting, for example, so as to put my house in danger of falling, I shall have my action, for they need not bring down my house to make their cutting. They can provide support for the house, or otherwise conduct their works more carefully. When the company can construct its works without injury to private rights, it is, in general, bound to do so." Pollock on Torts (Webb's Am. Ed.) supra; *Stearns v. City of Richmond*, 88 Va. 992, 14 S. E. 847, 29 Am. St. Rep. 758.

Walker Bros. v. Southern Ry. Co

The judgment of the law and equity court is therefore reversed, and the cause remanded, with leave to amend the declaration in any manner that the plaintiff may be advised, not inconsistent with the foregoing opinion.

CARDWELL, J., absent.

WALKER BROS. v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, Dec. 13, 1904.)

[49 S. E. Rep. 84.]

Carriers of Freight—Delay in Transportation—Violation of Penal Statute.

Acts 1903, p. 999, c. 590, providing that any railroad company failing to transport goods received by it for shipment, and billed to any place within the state, for a longer period than four days after receipt of the same, unless otherwise agreed between the parties, shall pay a penalty, etc., refers to a delay in beginning the transportation or starting the goods from the station of their receipt, and does not require a delivery at their destination within the time specified.

Same—Same—Same—Burden of Proof.

In an action against a railroad company, under Acts 1903, p. 999, c. 590, to recover a penalty for a delay of more than four days in the transportation of goods, the burden of showing where the delay occurred is on plaintiff.

Clark, C. J., and Douglas, J., dissenting.

Appeal from Superior Court, Alamance County; Cooke, Judge.

Action for a penalty by D. M. Walker and another, constituting the firm of Walker Bros., against the Southern Railway Company. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

This action was brought to recover the penalty for failure to transport freight given by chapter 590, p. 999, § 3, of the Acts of 1903. Plaintiffs alleged that there had been a delay of four days, and demanded judgment for \$40; that is \$25 for the first day and \$5 per day for the next three days of delay. The material portion of the evidence was as follows: (1) Bill of lading issued by the defendant, bearing date Cum-nock, N. C., May 27, 1903, for a car load of lumber, to be transported to the defendants, at Graham, N. C. J. R. Burns was the shipper. (2) The receipt of the plaintiff for the said freight, bearing date, "Graham, N. C., June 4, 1903." D. M. Walker, one of the plaintiffs, testified that he and J. C. Walker constitute the firm of Walker Bros. The witness identified the bill of lading and freight bill hereinbefore referred to, and said the dates as therein stated were correct. The plaintiffs operated a sawmill situated about 160 feet from the main line of the North Carolina Railroad Company, some 300 or 400 yards east of the station at Graham, in Alamance county, and were accommodated by what is ordi-

Walker Bros. v. Southern Ry. Co

narly known as an industrial or spur track running from the main line into their yards, which are inclosed. When they receive freight by the car load, the car is placed by the defendant on this spur track and unloaded in the millyard of the plaintiffs. The car in question was delivered to them in their yard on June 4, 1903. The bill of lading was received by the plaintiffs through the mails about the 28th May, 1903. Plaintiffs made demand upon the agent of defendant at Graham. The spur or industrial track was put in at the instance of the plaintiffs, and operated, as witness supposed, for the accommodation of both the plaintiffs and defendant, as the cars could be unloaded sooner. No extra charge was demanded or made against the plaintiffs for shifting and carrying cars from the main track of the defendant into the yard of the plaintiffs by means of the spur track. The cars containing freight for other parties were not put upon the spur track of plaintiff without their permission, nor carried inside the gate of plaintiffs' yard. The witness did not know of his own knowledge when the car in question arrived at Graham Station. The train passed, but he did not see it come. The freight in question was brought in the car from Cumnock by way of Greensboro, and from the latter place to Graham. There are four stations or stops between Greensboro and Graham, and ten stations between Greensboro and Cumnock. The 31st day of May, 1903, was Sunday. Witness made demand on the railroad company for the car of freight in question, and at that time the car had not arrived in Graham. It was admitted by the parties that the defendant transported freight and passengers through several states, including this state, and is engaged in interstate commerce; and it was admitted that Cumnock and Graham are stations on different roads, both of which are operated by defendant within this state. Plaintiffs here rested their case. The defendant thereupon moved to nonsuit the plaintiffs, under the statute, which motion was allowed, and judgment was rendered accordingly. Plaintiffs excepted and appealed.

Long & Long, for appellants.

F. H. Busbee and King & Kimball, for appellee.

WALKER, J. (after stating the facts). It is provided by Acts 1903, p. 999, c. 590, § 3, that any railroad company failing to transport goods received by it for shipment, and billed to any place in this state, for a longer period than four days after the receipt of the same, unless otherwise agreed between the parties, or allowing such goods to remain at any intermediate point more than forty-eight hours, shall pay to the party aggrieved a penalty of \$25 for the first day, and \$5 for each succeeding day, of unlawful delay or detention, if the shipment is in car-load lots, and, if in smaller quantities, then a less sum, which is prescribed by the act. The plain-

tiffs claim that by the statute the defendant is allowed only four days to make the shipment, and any delay beyond that time subjects it to the penalty. We do not think that is the proper construction of the law. The word "transport" does mean to carry or convey from one place to another, but it also means to remove, and this is one of its primary significations, according to the lexicographers. Whatever may be the precise meaning of the word when considered by itself and apart from the special connection in which it is used, the context of the act under review clearly shows that the Legislature did not intend to be understood as requiring the entire transit to be made within four days from the receipt of the goods. Such a construction might produce serious results, and impose upon transportation companies not only a very onerous duty, but one which in some cases it would be difficult, if not impossible, to perform. It has been said that in regard to laws, as in other cases, difficulties will arise, in the first place, from the disputed meaning of individual words, or, as it is usually expressed, of the language employed, and, in the second place, assuming the sense of each separate word to be clear, doubt will result from the whole context. This is due in large measure to the imperfection of language and its inadequacy in conveying our meaning. We must therefor regard the context and the general scope of the law, as well as the mischief to be suppressed and the remedy provided for that purpose, so as to arrive at the intention of the Legislature. "When we see what is the sense that agrees with the intention of the instrument [or statute], it is not allowable to rest the words to a contrary meaning. No text imposing obligations is understood to demand impossible things." Sedgwick, Stat. & Const. Law (1857) c. 6, pp. 225-235. Whenever the intention can be discovered it ought to be followed, with reason and discretion, in construing the statute, although it may not seem to conform to the letter. Sedgwick, *supra*. We have no doubt as to the true intention of the Legislature in passing this act. The very phraseology of the statute indicates clearly the purpose that the penalty shall be incurred if the company delays to begin the transportation to start the goods on their journey within four days after they are received for shipment. The fact that the law provides against unreasonable delay during the course of the transportation at any intermediate station is conclusive evidence that the neglect or omission to transport for a longer period than four days refers to a delay at the initial point or the place of departure. To hold it to have been contemplated that four days only from the time of receipt should be allowed for the shipment of the goods and their delivery at the place of final destination would impute to the Legislature an intention to adopt a harsh and impracticable rule, and therefore an unreasonable one, as the time allowed might not be sufficient in many cases for

the transportation, as thus understood. Having concluded that the four days must apply to the time of shipment, we find no evidence as to when the goods left Cumnock, nor as to when they reached Graham; and, even if there had been such evidence, we have failed to discover any proof as to the distance between Cumnock and Graham, or as to the time reasonably required to carry the goods from the one place to the other. The burden was on the plaintiff to bring forward the proof necessary to establish his allegations and to make out his case, and, in the absence of evidence, we can raise no presumption in his favor. If the defendant has violated the law and incurred its penalty, the plaintiff must show it affirmatively. There is not in this case the slightest evidence as to the essential fact to be proved. The plaintiff, in the case of a nonsuit, is entitled to have the benefit not only of every fact which the evidence tends to prove, but of every legitimate inference from the facts as well, but this does not mean that he will be permitted to recover upon mere conjecture. The court did not err in refusing to submit the case to a jury, as there was a total failure of proof. The nonsuit was properly entered.

In the answer the defendant sets up as a defense the unconstitutionality of the act upon the ground that it interferes with interstate traffic. We were told by counsel in the argument before us that this defense was not relied on in the court below, nor did he insist upon it in this court. We think the point was properly abandoned. The act cannot be successfully assailed upon this ground. It has been thoroughly settled that such legislation does not contravene the commerce clause of the Constitution. The most recent decision of this court upon the subject is *Currie v. Railroad*, 135 N. C. 535, 47 S. E. 654. But other decisions on the point are abundant. *Bagg v. Railroad*, 109 N. C. 279, 14 S. E. 79, 14 L. R. A. 596, 26 Am. St. Rep. 569; *Smith v. Ala.*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; *Railroad v. Fuller*, 17 Wall. 560, 21 L. Ed. 710; *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819; *Railroad v. Dwyer* (Tex. Sup.) 12 S. W. 1001, 7 L. R. A. 478, 16 Am. St. Rep. 926. Numerous authorities sustaining the right of the state to pass such a law are collected in the cases we have cited. Legislation of a state which incidentally or indirectly affects commerce between the states, and especially such as is passed in the exercise of the police power, is not to be considered regulation of that commerce, within the meaning of the Constitution of the United States. Besides all this, it appears in our case that the traffic was to be conducted wholly within this state, and it cannot, therefore, in any allowable view, be regarded as interstate trade; nor can the statute, in so far as it affects that traffic, be held invalid as an attempt to usurp the power of Congress to regulate interstate commerce.

In deciding this case, we have confined ourselves, as we

Faul v. North Jersey St. Ry. Co

should do in all cases, to the facts as they appear in the record. We have no right to supply any defect in the plaintiff's proof by assuming the existence of any fact which the testimony does not tend to establish. If the plaintiff has a good cause of action against the defendant, he must show it by legal evidence, and not leave anything essential to its completeness to surmise or conjecture. This must be required of him and all others similarly situated, as we cannot in any other way decide safely and with a due regard for the rights and interests of litigants, which must be determined by well-settled methods of judicial procedure, applicable alike to all cases, and not by any arbitrary or capricious notion of what should be done in any particular case in order to mete out justice. By pursuing the latter course, we would often base our judgments upon mistaken or misunderstood facts, and defeat the very purpose intended to be accomplished in all judicial investigations.

We find no error in the case, and it must be so certified. No error.

FAUL, v. NORTH JERSEY ST. RY. CO.

(Court of Errors and Appeal of New Jersey, Nov. 14, 1904.)

[59 Atl. Rep. 148.]

Injury to Street Car Passenger—Negligence—Jolting.*

It is not sufficient evidence of negligence in the motorman of an electric street railway, when about to start or to increase the motion of a heavily loaded passenger car, that he turned on the power and released his brake so as to cause a passenger standing on the front platform to "swing to the side a little bit," or "fall a little to the side." From such a result alone the jury cannot reasonably and legitimately infer negligence of car operation against the carrier.

Same—Same—Same.

The actual management of the car in such cases, not the resultant effects, should determine the question of the carrier's negligence. (Syllabus by the Court.)

Error to Circuit Court, Essex County.

Action by Jacob Faul against the North Jersey Street Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Chauncey E. Parker, for plaintiff in error.

Leonard Kalish, for defendant in error.

VREDENBURGH, J. The refusal of the trial court at the close of the evidence, upon the defendant's motion, to direct a verdict in its favor on the ground that no negligence imputable to it had been shown, brings, under exception, the whole record of the case here in review. Unless from the

*See foot-note appended to *Rutledge v. New Orleans*, etc., R. Co. (C. C. A.), 11 R. R. R. 488, 34 Am. & Eng. R. Cas., N. S., 488.

Paul v. North Jersey St. Ry. Co

established facts such negligence might reasonably and legitimately be inferred by the jury, such a direction was the right of the defendant. It is certainly clear law that the mere fact of a passenger's fall while standing on the platform of a street car raises in itself no inference of negligence in its operation by the car company. We are not at liberty, under well-settled authority, approved by this court, to deduce negligence on the carrier's part from the occurrence alone of such an accident. *Paynter v. Bridgeton, etc., Traction Company*, 67 N. J. Law, 619, 52 Atl. 367, and cases there cited. In the case in hand the incident from which this controversy grew happened February 5, 1901, on a very cold, stormy, and exceedingly windy night, accompanied at times by hail and snow. The plaintiff, in his testimony, thus briefly relates the affair: The car he boarded was very crowded with passengers inside, and the rear platform, on which he stood, "was crowded, too. * * * I had a little dinner pail in my hand—in one hand. * * * I held the railing with my right hand. * * * I fell off the car. * * * They drove on slow, and drove a little ways, then the car took a jolt, * * * and that jolt threw me * * * from the platform. * * * Car had gone maybe a hundred feet." Reasoning from effect to cause, it was insisted on behalf of the plaintiff that the alleged "jolt" was a fact from which the jury could legitimately infer that the motorman had started his car forward with such extraordinary violence as to constitute actionable negligence on the part of the company. No claim was made that the tracks, or switch, or roadbed were in any way defective, or could have caused any such jolt. The track was straight, and the grade level. The controversy was therefore narrowed to the alleged negligent conduct of the motorman in releasing his brake or in turning on the power, or both, after leaving the switch where the car had stopped. I think it will be found from an examination of the evidence of the only witness for the plaintiff who observed the action of the motorman that his car was managed with due care both before and coincidentally with the accident. The position in which the plaintiff himself stood—in a crowd upon the edge or step of the rear platform—necessarily prevented him from observing the methods of managing the car pursued by the motorman on the front platform. The plaintiff had, therefore, to rely upon other testimony to prove the negligent operation of the car, and produced a Mr. Seyfarth as his witness for that purpose. The pertinent facts stated by this witness were that he rode, on the night in question, on the front platform of the car, because he could not get on the rear on account of the crowd there; that he stood alongside of the motorman both before and after the accident; that after crossing the Jones Street Line the car stopped, and he took the switch iron, and turned the

Faul v. North Jersey St. Ry. Co

switch for the motorman, and then the car proceeded on its way; that when they got up to Fifteenth avenue, near a grocery store there was a wagon backed up against the curbstone that brought the hub of the front wheel very close to the car, and he said to the motorman that he did not think the hub of the wheel would clear the rear step of the car; that then the motorman "slowed up" his car so as to avoid hitting the wagon; that he stood up, holding himself "on the dash * * * or little rails that run along to protect the windows from breaking." He thus described what followed: "I wanted to see whether this hub of the wheel would touch the rear end of the car—that is, the steps of the car—so I leaned over and looked, kind of judged up the distance between the hub of the front wheel and the rear end of the car, and I said it was 'all right.' Q. You said to whom that it was all right? A. To the motorman. Q. And what was done then? A. The motorman went right ahead then, and just as he did, why, I saw a man fall off the back platform while I was watching there. Q. Now, what had the motorman done before he approached that wagon as to the speed of the car? A. Well, he saw the wagon there, and he was just as much in doubt as I was, and kind of slowed up. Q. Now, when the car went ahead, what did he do in order to give his car speed? A. I could not see what he done because I was looking out the other way. Q. What did you feel, if anything? A. I felt the car go ahead. Q. Well, how? A. You can't feel very much in the front as you can at the back, because I was holding myself, and naturally I swung a little bit to the side, but it wasn't very severe in the front. Q. It did swing you to the side, did it? A. Yes, sir; a little bit." Upon cross-examination he said: "Q. Then there was nothing unusual about the starting of the car that night, was there? A. Well, not just at that moment. * * * Q. It started just as cars ordinarily do? A. Well, just according to the motorman. Question repeated: There was nothing unusual about the starting of the car that night, was there? A. Certainly, there was. I tell you so in the last trial. * * * Q. Did you anywhere, in your testimony at the last trial, swear that the car started with any unusual motion? A. Well, there are two ways for me to answer that. Q. Well, answer it both ways then. A. I said it all depends upon how the motormen start the car. * * * Well, I fell a little to the side." From these facts stated by the witness—not from his opinion nor conclusions thereon—could the jury reasonably and legitimately infer the negligent management of the car by the motorman? No passenger inside of the car, whether standing or sitting, testified that he noticed any jolt of the car. That expression was only used by the plaintiff. Admitting, for the sake of the discussion, that the slowing up of the car to avoid the wagon, and the increase of speed after clearing the obstruction, may

not have been done skillfully, it by no means follows that it was done negligently. There is a wide distance between want of skill and negligence. The motorman certainly acted discreetly in avoiding collision with the wagon. Obligated, as he was, to stand on the front platform, exposed for hours to the hail and blasts of a stormy winter's night, it would not have been at all surprising if his eye had miscalculated the distance from the track of the obstructing wagon, or his cold hand had slipped for a moment from the metal handle of his brake. If, from such misadventure or unskillfulness, the "jolt" in question resulted, can it be reasonably affirmed that he acted negligently? His method of starting or increasing the speed of his car was not testified to have been even unskillful, much less negligent. In order to resume his progress after "slowing up" and avoiding the wagon, he was, of course, compelled to turn on his power and release his brake, the effect of which was to cause the plaintiff's witness, who was standing, to swing to the side "a little bit" or "fall a little to the side." No court (certainly of this state) has yet declared that such an effect justified an inference of negligence in car operation against the carrier. On the contrary, in *Burr v. Pennsylvania R. R. Co.*, 64 N. J. Law, 30, 44 Atl. 845, the Supreme Court, Mr. Justice Van Syckel writing the opinion, declared that, if there is no more violence and lurching than ordinarily attends the starting of a railroad train, the jury cannot draw from it the inference that the company was negligent; and that "it was not until extraordinary lurching and violence was shown that negligence could be presumed," etc. In *Corkhill v. Camden & Suburban Railway Co.*, 69 N. J. Law, 97, 54 Atl. 522, where a passenger was thrown to the floor by the lurch of a street car occasioned by the motorman suddenly increasing the speed of the car to avoid a collision with a railroad train, the act of the motorman was held not to constitute negligence in the operation of the car. The court regarded the actual management of the car as the only correct test of negligence. The sudden jerk in starting a street car by a driver whipping up his horses, which threw down a passenger standing on the car platform, was the subject of decision of this court in *May v. North Hudson Ry. Co.*, 49 N. J. Law, 445, 9 Atl. 688. The principle there settled was, I think, identical with that involved in the case at bar. In that case the car (drawn by horses) was full of passengers, and the plaintiff was standing on the platform. The track was straight, and the grade about level. The driver stopped, or almost stopped, the car for a lady to alight, and after she had alighted he whipped up his horses, and, according to the testimony, the car gave a sudden jerk, which threw the standing passenger off the platform, and he was injured. The close correspondence between the facts of this case and the present is too apparent to need comment. The driver there "whipped up" his

horses in order either to start his heavy and crowded car quickly or to keep it in motion, and the motorman here "whipped up" his electrical current for the same purpose. The result in each case was the same. A passenger standing on the platform was claimed to have been thrown from each car. In such case it was necessary to apply sufficient force to start a heavily loaded car, and the nice judgment of the exact amount of power necessary was therefore difficult of calculation. This court held that the jerk of the car resulting from the sudden whipping up of the horses did not afford evidence of negligence in the driver. Nor can the evidence in the present case, consistently with that ruling, it seems to me, establish negligence in the motorman. The change from horse power to electricity propulsion brings into use a still more difficult agent and control, but the basic principle of the law of negligence has not changed. There are a large number of cases decided by the courts of this state and of various other jurisdictions upon the general subject of the negligence of car companies in cases where passengers have been thrown from the platform of cars under a variety of circumstances, but reference to them would not materially assist us here. The only decision of this court which it may be well to distinguish from the case in hand is that of Consolidated Traction Co. v. Thalheimer, 59 N. J. Law, 474, 37 Atl. 132. In that case the passenger, who was thrown off the street car, in the act of alighting, by a lurch or jerk of the car, had notified the conductor of her desire to get off at a certain street, designated by her, and, after the conductor had called out the name of that street, had arisen and gone to the rear door in preparation of alighting. This court held that under those circumstances the jerk of the car justified an inference of some breach of duty owed to her by the carrier. Manifestly, the conduct of the company's agent was an invitation to alight, and was calculated to put the passenger off her guard at the very time she had a right to expect the car would become stationary. No such fact appears in the case at bar. That case is readily distinguishable from the present by the above circumstantial statement. The two cases rest upon different principles of classification.

At least two witnesses for defendant testified that they saw the plaintiff, before he fell (in attempting to grab hold of his hat to prevent the wind blowing it away), release the only hold he had upon the railing of the moving car just before he fell off. This evidence the plaintiff, although afterwards recalled as a witness in rebuttal, did not attempt either to controvert or to explain. This being undenied, the wonder is, not that he fell off the platform of the starting or moving car on that very windy night, but that he retained, without the hold of either hand upon the car, his precarious footing there for any length of time at all. But whether or not the nature of the start or increased motion of the car was of such a

Russell v. Erie R. Co

character as to have been alone instrumental in causing the plaintiff's fall, the motorman's management of the car seems, under all the evidence, to have been duly careful and without negligence. The accepted rule in actions founded upon negligence is that, when the plaintiff shows that he was injured through some act of the carrier's servant which might have been prevented by due care, if the carrier proves that such care was in fact exercised, negligence cannot be inferred by the jury. *Whalen v. Consolidated Traction Co.*, 61 N. J. Law, 609, 40 Atl. 545, 41 L. R. A. 836, 68 Am. St. Rep. 723, and cases there cited.

The judgment below should be reversed.

RUSSELL, et al. v. ERIE R. CO.

(Court of Errors and Appeals of New Jersey, Nov. 14, 1904.)

[59 Atl. Rep. 150.]

Carriers—Limiting Liability.*

It is lawful for a carrier to limit, by special contract, his common-law liability, and he may thereby exempt himself from liability for any loss resulting otherwise than by the negligence or misfeasance of himself or his servants.

Same—Shipping Order—Authority of Cartman to Modify.

Where the owner of goods held in storage directed the storage company to send them to him by railroad, and an officer of the storage company sent the box containing the goods by a cartman to the railroad station, accompanied by a complete shipping order, the agent of the railroad company had no right to assume that the cartman had the authority to alter or modify the terms of the shipping order.

Same—Same—Notice to Carrier—Limiting Liability.

The presentation of the shipping order, signed by the storage company, was notice to the railroad company that the authority of the cartman was in no sense discretionary. It consisted only in delivering the goods and paying the freight, and there was no authority on his part to enter into a contract to exempt the railroad company from liability.

Contracts—Ratification.

In order to constitute a ratification, there must be acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances.

(Syllabus by the Court.)

Error to Supreme Court.

Action by May C. Russell and others against the Erie Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

This action was brought by the plaintiffs to recover the value of a box containing goods owned by Mrs. Russell, which had been consigned from Buffalo, N. Y.,

*See foot-note appended to *Ragdale, Harper & Weathers v. Southern Ry. Co.* (Ga.), 12 R. R. R. 120, 35 Am. & Eng. R. Cas., N. S., 120; foot-note appended to *Powers Mercantile Co. v. Wells-Fargo & Co.* (Minn.), 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504.

Russell v. Erie R. Co

to Rutherford, N. J., over the Erie Railroad, and lost in transit. In June, 1902, Mrs. Russell caused the box in question, containing the goods belonging to her, to be stored with the Goldhagen Storage Company in Buffalo. Mrs. Russell and her husband had packed the articles in the box. It was nailed up, and marked "Last Box Packed." On the 19th of September, 1902, Mrs. Russell wrote to Mr. E. E. Goldhagen, of the Goldhagen Storage Company, saying: "Send a box marked 'Last Box Packed' to M. C. Russell, Rutherford, over Erie Railroad. I would like them sent as soon as possible, and if you will kindly prepay charges I will refund check for same, together with storage rent." No other directions appears to have been given by Mrs. Russell. Mr. Goldhagen testified that on receipt of the letter he "made out the freight bill, marked the tag and nailed it on the box, sent for his cartman, instructed him to pay the freight, and bring him a copy of the freight bill back." He made out a freight bill or shipping order upon one of the printed forms of the Erie Railroad Company, and in the proper place left thereon he wrote, "Buffalo, N. Y. September 23, 1902, Mrs. M. C. Russell, Rutherford, New Jersey, 1 Box;" and he signed the shipping receipt "Goldhagen Storage Company." It appeared that Goldhagen wrote nothing else upon the printed form, and delivered the same to one Weisser, together with the box, and gave him the directions above set forth. He gave the cartman no instructions as to the rate of freight he should pay. Weisser, after receiving the box, with the above instructions, from Goldhagen, turned it over to another cartman in the same employ by the name of Hoffmeister. He said that he was told to pay the freight, and that no instructions of any kind were given to him. Hoffmeister took the box to the Erie Railroad, and there delivered it to the tallyman, who asked what the box contained, and on being told by Hoffmeister that it contained household goods marked the letters "H. H." on the shipping order. Hoffmeister then presented the shipping order to one Fleming, the chief biller of the company, for the purpose of paying the freight. Fleming asked him what the box contained. On the carrier's replying "household goods," he added "gds." after the "H. H." on the shipping order, and then said there were two rates of freight—one a rate of 39 cents valuation, released to \$5 a hundred in case of loss or damage; then there was a rate of 58½ cents a hundred valuation, not released. Fleming testified that Hoffmeister said he wanted the cheaper rate, and that he figured it out at 47 cents, marked it on the shipping order and the original bill of lading. Hoffmeister's version was, "I told him to give me the cheaper rate, because, if they wanted to pay the higher rate, they would send it by express." Fleming wrote on the shipping order the words, "Value relsd. to 5.00 per 100," and also wrote it on the bill of lading. He then made out a prepaid order for 47 cents,

Russell v. Erie R. Co

and sent Hoffmeister to the cashier to pay that amount. On the day following the bill of lading was brought back to Goldhagen. He folded it up, and sent it by mail to Mrs. Russell, without noticing the words, "Value reisd. to 5.00 per 100," written on it with lead pencil. On October 3d, on receipt of the waybill, the agent at Rutherford sent Mrs. Russell notice that her box had arrived. The next morning her husband directed a drayman to call for the box. When he called for it at the freight yard, it was missing. On October 15th Mrs. Russell notified the company of the loss of the box. At the trial counsel agreed that the value of the contents of the box was \$300. The case was tried at the Bergen circuit before Mr. Justice Pitney and a jury, and a verdict was rendered for the plaintiff for \$363.55.

Collins & Corbin, for plaintiff in error.

Copeland, Luce & Kip, for defendants in error.

VROOM, J. (after stating the facts). It was conceded at the trial that in the course of transit from Buffalo, N. Y., to Rutherford, in this state, the property of the plaintiffs below was lost, and that the plaintiffs were entitled to a verdict for some amount by reason of that loss. The claim of the railroad company was that the trial judge should have charged the jury to find a verdict for the plaintiffs for \$6.47, being the amount of the value of the shipment at the rate of \$5 per 100 pounds, plus the amount of freight, 47 cents. This request of defendant was declined, and the case was left to the jury on the questions whether Mrs. Russell was charged with the terms of the returned bill of lading and the writing thereon, and whether the carter, Hoffmeister, had apparent authority to agree to a limitation of liability, and whether there was an agreement made to limit liability.

The first count in the declaration attributed negligence to the defendant's employees in the carriage and transportation of these goods, but the trial judge properly held that this was not sustained by the evidence, and charged the jury that they could not find a verdict against the defendant on that ground. That it is lawful for a carrier, by special contract, to limit his common-law liability, is admittedly the general rule in this country, and he may thereby exempt himself from liability for any loss resulting otherwise than by the negligence or misfeasance of himself or his servants. That a common carrier cannot, by contract, secure exemptions from liability for losses occasioned by its negligence, was held in *Paul v. Pennsylvania R. Co.* (Supreme Court, Feb. Term, 1904) 57 Atl. 139. Where there is no express contract limiting the liability of the carrier, he is bound, when goods are delivered to him for transportation, to deliver them, unless prevented by the act of God or other cause which would excuse the carrier from the undertaking of insurance. The question, then, arises whether there was any contract made

Russell v. Erie R. Co

in this case limiting the liability of the defendant, which is binding on the plaintiff, Mrs. Russell. The burden of proof of showing such a limitation of liability is on the defendant company, and, being in derogation of common right, is to be construed most strongly against the carrier. 5 Amer. & Eng. Ency. of Law (2d Ed.) p. 336; Ashmore v. Penna. Towning & Transp. Co., 28 N. J. Law, 180; Hooper v. Wells, Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211. No presumptions will be indulged in favor of exemptions from common-law liability. While it is competent for a common carrier to provide by contract for such exemptions, it must be done in clear and unambiguous terms. Edsall v. C. & A. R. & Transp. Co., 50 N. Y. 661; Babcock v. Lake Shore & M. S. Ry. Co., 49 N. Y. 491; Ætna Ins. Co. v. Wheeler, Id. 616; 6 Ency. Law & Procedure, 408. It will be conceded that the only contract limiting the liability of the company was made with one Hoffmeister, a cartman employed by the Goldhagen Storage Company, to carry the box containing the goods to the railroad. The instruction to have the goods shipped was from Mrs. Russell, and the directions in her letter to O. E. Goldhagen were simply to send a box marked "Last Box Packed" to M. C. Russell, Rutherford, N. J., over the Erie Railroad. Mr. Goldhagen did not go personally with these goods, but delivered them, with the two shipping orders, which he had filled out in his own hand, to a cartman—first to one Weisser, who turned the box and two papers over to another cartman named Hoffmeister. The evidence is explicit that no instructions were given to the carter save "Take the goods," "Pay the freight." He was given the money to pay the freight, and to bring back the bill. It will not be disputed that the doctrine cited by the plaintiff in error that "a consignor who sends goods to the depot of a carrier for shipment by an agent impliedly authorizes such agent to make a special contract with the carrier as to the carriage of the goods, and the acceptance by such agent of a receipt or bill of lading containing limitation upon the liability of the carrier will bind his principal." 5 Am. & Eng. Ency. (2d Ed.) p. 305. The law was clearly stated by the trial judge in his charge: "The ordinary rule is that a person intrusted with goods to take to a freight office, in order that they may be shipped by the railroad, is presumed to have general authority to agree with the railroad company as to the terms of shipment; and that would include authority to make a reasonable agreement limiting the liability of the railroad company as an insurer, limiting it with respect to the valuation of the goods, as far as the contract goes. So that, if Goldhagen, or the Goldhagen Storage Company, had gone with the goods, or if any person lawfully authorized by the Goldhagen Company had gone with the goods, without any limitation of his authority appearing, in that event it would be presumed that he had a right to make the contract limiting the railroad company's liability." Notwithstanding the fact that there

were no other instructions given to the carter, Hoffmeister, than above mentioned, the railroad company contends that the cartman had authority to make, in behalf of the plaintiff, a contract limiting the common-law liability of the defendant company. 6 Eucy. of Law and Procedure, p. 408, as follows, was cited in support of this contention: "One who has authority to ship goods for another has thereby implied authority to make a contract for their shipment, involving a limitation of the carrier's liability. Even though the delivery of the goods is by the cartman or teamster, if by the usual course of business between the shipper and the carrier it is customary for the cartman or teamster to accept the shipping contract, valid limitations therein limiting the carrier's liability will be binding on the shipper." This is a broad statement, and not borne out by the examination of the cases I have made. It will be noted, however, that nothing appeared in the testimony in this case showing the usual course of business between the shipper and the carrier, or that it was customary for the cartman or teamster to accept the shipping contract; but it does appear from the evidence that the cartman here had no express authority to agree to a limitation of liability. An instructive case (*Nelson v. Hudson River R. Co.*, 48 N. Y. 498) from the Court of Appeals of New York was cited by both the plaintiff and defendant in error; by the former because it seemed to support the authority of the cartman to make a contract limiting liability, by the latter because the enforcement of the liability was not put upon the ground that the cartman had authority to make the contract, but of what the court termed "a most complete and unequivocal ratification of the contract by the consignor." In the opinion in that case *Earl, J.*, said (page 510): "The cartman had no authority to make this contract. He was merely the servant of the consignors to deliver this box to the railroad, and was clothed with no discretion to act for them. No authority could be implied from his character or business, and his principals were near at hand, where they could act for themselves. But he assumed to act for them, and to do what they were authorized to do. They were notified of all the facts, and the contract made by him for them was delivered to them. They were informed, if they had any objection to the contract made by their assumed agent, they should notify the defendant the next day. They made no objection and expressed no dissatisfaction with the contract, leaving the defendant's agent to suppose that it was satisfactory to them. It seems to me these facts constitute a most emphatic and unequivocal contract. A subsequent ratification, with knowledge of the facts, of the acts of the assumed agent, is equivalent to an original authority, and as this was a contract which the consignors would have deputed the cartman to make for them, it must be treated as made by them in person, and binding on the plaintiff." And in

Russell v. Erie R. Co

Seller v. The Pacific, 1 Or. 409, Fed. Cas. No. 12,644, it was held that where a drayman of the shipper, on the delivery to the carrier of a package, takes a receipt from the freight clerk of the ship containing the words "not accountable for contents," this of itself does not constitute such an agreement. It is mere ex parte proposition on the part of the carrier after the receipt of the package, and to exonerate the carrier there must be direct or unequivocal evidence of the assent of the shipper. I am clearly of opinion that no authority was disclosed which would warrant the making of any contract by the cartman which would limit the liability of the railroad company as common carriers. When the Goldhagen Storage Company sent this box by the cartman to the railroad station, it was accompanied by a complete shipping order, and upon what principle can it be contended that the agent of the railroad company had the right to assume that the cartman had authority to alter or modify the terms of the shipping order? It seems to me that the duty of the agent plainly was to accept the goods on the terms stated in the order or refuse them, or he could, as actually was done here, take the risk of subsequently showing the authority of the cartman to change the terms of the contract. The railroad company was notified by the presentation of this shipping order, signed by the storage company, that the authority of the cartman was in no sense discretionary; that it was of the simplest kind, and consisted merely of delivering the goods and inquiring and paying the amount of freight; and there was no authority on his part to enter into any contract so important as the exemption of the railroad company from liability. The charge of the trial judge on the point was not erroneous, although too favorable to the defendant.

If, however, the act of Hoffmeister was subsequently ratified by the Goldhagen Storage Company or Mrs. Russell, it is binding upon Mrs. Russell, although Hoffmeister was not authorized to make this limitation, and although he was not clothed with apparent authority. As was laid down in **Nelson v. Hudson River R. R. Co.**, supra, "A subsequent ratification, with knowledge of the facts, of the acts of the assumed agent, is equivalent to an original authority." The contention of the plaintiff in error was that there was acceptance and ratification by Goldhagen, plaintiff's agent, of the offer of the carrier to reduce the freight rate in consideration of the limitation of liability authorized by Mrs. Russell. But there was no duty in the Goldhagen Storage Company on the return of the carrier with the bill of lading to see whether the railroad company had accepted the goods on the terms stated in the shipping order. This, I think, was to be assumed in the absence of notice to the contrary. In the case of **Nelson v. Hudson River R. Co.**, supra, notice was given to the consignors of the contract made for them by the

Russell v. Erie R. Co

cartman, and they were given until the next day to object to it. The intention of a carrier to limit his liability as insurer must be brought home to the shipper by a clear and unambiguous notice, and, as stated by the Supreme Court of the United States, "the right of the carrier, then, to limit his liability in the shipment of goods, has, we think, never been doubted. But admitting the right thus to restrict his obligation, it by no means follows that he can do it by any act of his own. He is in the exercise of a sort of public office, and he has public duties to perform from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be supplied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to." *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 382, 12 L. Ed. 465. A ratification is defined to be the confirmation of a previous act done either by the party himself or by another. It is the confirmation of a voidable act. 23 Am. & Eng. Ency. p. 889. And a confirmation necessarily supposes a knowledge of the thing ratified. *Blen v. Bear River, etc., Mining Co.*, 20 Cal. 613, 81 Am. Dec. 132; *San Diego, etc., R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 44 Pac. 333, 33 L. R. A. 788. It follows, then, that, in order to constitute a ratification, there must be an acceptance of the results of the act with an intent to ratify and with full knowledge of all the material circumstances. *Ansonia v. Cooper*, 64 Con. 544, 30 Atl. 760.

The insistence of the railroad company is that, even if the cartman had no lawful authority to make the agreement limiting the company's liability, yet the receipt of the bill of lading as changed by Goldhagen, without objection, was an acceptance of the company's proposition, and likewise the receipt of the bill of lading by Mrs. Russell, without objection, was an acceptance by her of the contract therein expressed. In other words, both ratified the illegal contract made by the cartman. But, if ratification necessarily supposes a knowledge of the thing ratified, and Mr. Goldhagen testified that he noticed no alteration in the bill of lading when he sent it to Mrs. Russell on its return to him by the cartman, and as no notice was given to him of the alteration there could have been no ratification on his part. And Mrs. Russell certainly could not have been held to ratify it, in the absence of any notice, and when she received the bill of lading not earlier than three days after the goods were shipped, and too late to recall the box.

This question of ratification the trial judge left to the jury, and the following parts of his charge relate thereto: "Now, did Mr. Goldhagen see that [referring to the alterations by the company's agent in the bill of lading] and notice it? He testifies not. I don't know anything on which you have a right to believe that he did not see it, and notice it as an alteration of the contract, and therefore the question is, was he negligent

Chicago & W. I. R. Co. v. Newell

in not noticing it? Would a reasonably careful man, in his situation, have noticed it; noticed it, I mean, not as a mere scratch or word written upon the paper, but as an intended alteration of the contract that he had proposed to the company? That is the point. If Mr. Goldhagen did not notice it, then comes the question of what Mrs. Russell noticed. It was mailed—the paper was mailed, this bill of lading—by Goldhagen to Mrs. Russell, and reached her presumably a day or two after the 24th day of September, two or three days after the shipment, as I understand the evidence. Well, the question of what he, as a reasonably prudent person, ought to do, is quite different, because, you see, she was not where she could easily communicate with the railroad, and not as well charged with the circumstances of the shipment as Mr. Goldhagen; but at any rate it is for you to say whether, if she had been reasonably prudent, she would or would not have been charged with this notice." Clearly, so far as the plaintiff in error is concerned, there was no error in this part of the charge. The criticism only to be made is that it is too favorable to the plaintiff in error.

The questions of the authority of the cartman to modify the terms of the contract, and of the notice to the consignor of such alteration, and of ratification, having been found by the jury in favor of the plaintiffs below, the added terms to the bill of lading, describing the contents of the box as "H. H. gds.," and limiting the liability to \$5 per 100 pounds, become immaterial, and need not be further considered.

I find no error, and the judgment below should be affirmed.

CHICAGO & W. I. R. CO. v. NEWELL.

(Supreme Court of Illinois, Oct. 24, 1904.)

[72 N. E. Rep. 416.]

Injury to Passenger—Negligence—Speed around Curve.*

Where a railroad train was so crowded with passengers that some of them were standing on the platform, and the train rounded a curve at the rate of 25 or 30 miles an hour, and a passenger was thrown off, in an action for his injuries it could not be said as a matter of law that there was no negligence in so operating the train.

Same—Contributory Negligence—Riding on Platform.†

Where a passenger was injured by being thrown from the platform of a railroad train as it rounded a curve, in an action for the injuries, it appearing that neither seats nor standing room in the cars could be conveniently obtained, it was a question for the jury whether plaintiff was guilty of contributory negligence.

*See foot-notes appended to *Fitch v. Mason City & C. L. Traction Co.* (Iowa), 12 R. R. R. 451, 35 Am. & Eng. R. Cas., N. S., 451; foot-notes appended to *Rutledge v. New Orleans & N. E. R. Co.* (C. C. A.), 11 R. R. R. 488, 34 Am. & Eng. R. Cas., N. S., 488.

†See foot-note appended to *Brunnchow v. Rhode Island Co.* (R. I.), 12 R. R. R. 512, 35 Am. & Eng. R. Cas., N. S., 512.

Chicago & W. I. R. Co. v. Newell

Same—Liability for Negligence of Lessee.†

A railroad company holding a franchise and right to operate a railway is liable to passengers injured on the railway by the negligence or wrongful act of another company operating the same.

Instructions.

There is no error in refusing instructions covered by those given.

Expert Testimony—Speed of Trains.

Where a railroad train was so crowded that certain passengers could not conveniently obtain seats or standing room inside the cars, and when the train rounded a curve at the rate of 25 or 30 miles an hour a passenger was thrown from a platform and injured, in an action for the injuries it was proper to sustain an objection to a question to a witness as an expert as to whether trains could be operated over the tracks where the accident happened, with safety, at such speed, the question being immaterial under the facts.

Evidence—Prior Crowded Condition of Car.

It was not error to permit a witness to testify as to the crowded condition of the train at a point several blocks distant, it appearing that the train had not stopped between that place and the place of the accident.

Injury to Passenger—Negligence—Speed around Curve—Evidence—Ordinance.

Where a railroad train was so crowded that passengers could not conveniently obtain seats or standing room in the cars, and plaintiff, while standing on the platform, was thrown therefrom as the train rounded a curve at the speed of from 25 to 30 miles an hour, it was not error to exclude an ordinance permitting trains to run 35 miles an hour at the place of the accident.

Appeal from Appellate Court, First District.

Action by Thomas Newell against the Chicago & West Indiana Railroad Company. From a judgment of the Appellate Court affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

G. W. Kretzinger, for appellant.

Proudfit & Lantz, for appellee.

WILKIN, J. Appellee recovered a \$5,000 judgment against appellant in the superior court of Cook county for personal injuries, and that judgment has been affirmed by the Appellate Court.

It was alleged in the several counts of the declaration that the defendant owned and operated a certain railroad, and had authorized and permitted the Chicago, Indianapolis & Louisville Railway Company to run its trains over the same for the carriage of goods and passengers for reward; that the plaintiff became a passenger on a certain train belonging to the latter company, to be carried from Chicago to Monon Park, in the state of Indiana, for a certain compensation; that it failed to furnish him a seat in the cars of its train, but so negligently crowded the train with passengers that he, using due care in that regard, was obliged to stand upon the platform of one of the cars; that the train was so carelessly, negligently, and recklessly managed and run over and upon a certain curve on a

†See foot-note appended to *Muntz v. Algiers & G. Ry. Co. (La.)*, 12 R. R. R. 552, 35 Am. & Eng. R. Cas., N. S., 552.

rough part of said road that "the car upon which the plaintiff was riding was violently swayed from side to side and jerked and jolted, and the plaintiff, in the exercise of due care, was with great force and violence thrown from said car and sustained the injuries complained of." The defendant filed a plea of the general issue, and also a special plea setting up the leasing of the road to the said Chicago, Indianapolis & Louisville Railway Company, and averring its nonliability for the negligence and torts of said lessee; but the court sustained a general demurrer to such special plea, and the defendant elected to stand by the same. A replication being filed to the plea of not guilty, the case was tried before a jury, with the result above stated.

The errors of law assigned upon the record which are relied upon for a reversal of the judgment below are, first, that the trial court erred in refusing to give the peremptory instruction to the jury to find for the defendant; second, the refusal to give certain instructions asked by the defendant upon the submission of the case to the jury; third, the giving of the fifth instruction on behalf of the plaintiff; and, sixth, the improper exclusion and admission of testimony.

Under the first assignment of error it is insisted that the evidence wholly failed to show negligence upon the part of the defendant and due care by the plaintiff, as alleged in the declaration; that there is an absence of evidence in the record tending to show that the appellant was the owner of the track at the place of the injury; and that, as a matter of law, it is not liable for the negligent acts of its lessee.

A committee of Orangemen had arranged with the company for four trains to be run from Chicago to Cedar Lake, at which place that society held a picnic on the 12th day of July, 1899. The trains were to leave Chicago at different hours during the morning and afternoon—one at about the hour of 10 o'clock a. m. Appellee, with a proper ticket, boarded that train at the station in Chicago, and, according to his own testimony, sought a seat in each of the several cars, passing from the rear to the front of the train, and finding the seats all occupied and the aisles filled with passengers standing. Upon his arrival on the platform of the first car he was unable to get back into the car because of the crowded condition, and the train started and he was compelled to ride in that position. Other testimony tends to corroborate his statement. At Seventy-Ninth street, in the city of Chicago, the railroad track upon which the train was running makes a sharp curve, and the testimony shows that the train ran around that curve at so rapid a rate of speed as to throw the plaintiff and another passenger off of the platform upon which they were to the ground, and to throw many of those who were standing in the aisles off their feet and others off the seats. The plaintiff was seriously injured, and the other passenger thrown to the ground and killed.

Under this state of facts—which, to say the least, the evidence fairly tended to establish—it cannot be seriously contended that the railroad company operating the train was not guilty of the negligence complained of in the declaration. There is evidence tending to show that as the train rounded the curve it was going at the rate of 25 or 30 miles an hour. Necessarily, the rapid rate of speed and the curve in the track exposed those persons standing on the platforms to danger of being thrown from the train. It cannot certainly be said, as a matter of law, that there was no negligence in thus operating the train. Ordinarily, it is *prima facie* evidence of negligence for a passenger to stand or ride upon the platform of a moving railway train; but where, as the evidence tends to show in this case, neither seats nor standing room in the cars could be conveniently obtained, it became a question of fact for the jury whether the plaintiff was guilty of contributory negligence by being upon the platform from which he fell. It is only when the inference of negligence necessarily results from the statement of facts that the court can properly instruct the jury that such facts establish negligence as a matter of law. Standing or sitting upon the platform or steps of a railway car when the train is in motion, although it may be *prima facie* evidence of negligence, is not, under all circumstances, negligence *per se* and as a matter of law. *Chicago & Alton Railroad Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406, and authorities cited.

We think the evidence proved the ownership of the railroad by the appellant, and, in fact, the defense that it was not liable for the negligence of its lessee assumes and admits that fact. That a railway company holding a franchise and right to operate the railway is liable to passengers injured on such railway by the negligence or wrongful act of another company operating the same has been decided by this court, in principle at least, since the case of *Leshner v. Wabash Navigation Co.*, 14 Ill. 85, 56 Am. Dec. 494. In *Peoria & Rock Island Railroad Co. v. Lane*, 83 Ill. 448, we said (page 449): "It is first urged that appellant is not liable for the negligence or mismanagement of the employees of that company whilst running on their tracks; that the Rockford, Rock Island & St. Louis Company are alone liable for their negligence. There is no doubt but they are liable for their own acts, and some courts have held that the company owning a road is not liable for the negligence of their lessees, or of other roads using their tracks by arrangement or consent; but this court has repeatedly held that a company holding the franchise and exclusive right to operate a road must so use it as not to endanger passengers or property, whether the use be by themselves or others they may permit to use the road, and that if they permit another company to run their trains on and over their tracks, and injury grows out of negligence of the use of the road thus authorized, the company owning the road

and franchise will also be liable." *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559; *Chicago & Erie Railroad Co. v. Meech*, 163 Ill. 305, 45 N. E. 290; *Chicago & Western Indiana Railroad Co. v. Doan*, 195 Ill. 168, 62 N. E. 826; *West Chicago Street Railroad Co. v. Horne*, 197 Ill. 250, 64 N. E. 331. We are still of the opinion that the doctrine announced in those cases is well supported by both reason and authority.

The evidence fairly tended to support the plaintiff's cause of action as alleged in his declaration, and the court therefore properly refused to take it from the jury.

The instructions which the court refused to give upon the request of the defendant all related to the question of the plaintiff's want of due care, and in various ways called the attention of the jury to the fact that he was riding upon the platform at the time of his injury. All that was stated in either of them proper to be given to the jury was contained in the first, second, third, sixth, and ninth instructions given at the request of the defendant. Those refused were therefore properly rejected.

The fifth instruction given on behalf of plaintiff stated a correct principle of law applicable to the case. It was based on the rule, heretofore referred to, which makes the owner of a railroad liable for the negligent operation of trains upon it by its lessees. As a whole, the instruction is in conformity with the decision in *Pennsylvania Co. v. Ellett*, supra.

The defendant introduced an expert witness, who was asked to give his opinion whether trains could be operated over the tracks where the accident happened, with safety, at the speed of 25 or 30 miles an hour, to which an objection was sustained. The question called for the statement of an immaterial fact as applied to the case. The material question was not whether trains could be operated over the track at the rate of 25 or 30 miles an hour, but whether or not this particular train was properly operated in view of all the facts and circumstances surrounding it.

Two witnesses were permitted to testify as to the crowded condition of the train at Archer avenue, a point several blocks distant from the place of the accident, and this, it is contended, was error. The evidence clearly showed that the train was not stopped between Archer avenue and the place of the injury. Therefore evidence of the condition at Archer avenue proved the condition at Seventy-Ninth street.

The defendant also complains of the refusal of the trial court to permit it to introduce ordinances of the city of Chicago which permitted trains to run 35 miles an hour at the place of the accident, and also in allowing the plaintiff to offer evidence to the effect that parties on the train complained as to the crowded condition of the train, without showing that the person to whom the complaint was made was an agent or officer of the company. The ordinances were clearly irrelevant. They did not authorize, or pre-

Kirchner v. Oil City St. Ry. Co

tend to authorize, the company to commit an act of negligence in running its train at the permitted rate of speed. The evidence does show that the complaint as to the crowded condition of the train was made to one of the officials with whom the arrangement for transportation was made. Even if that testimony had been improperly admitted, the error would not justify a reversal of the judgment below.

Other questions are raised in the case, which we have considered, but do not regard as of sufficient importance to require particular notice. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

KIRCHNER v. OIL CITY ST. RY. CO.

(Supreme Court of Pennsylvania, Dec. 4, 1904.)

[59 Atl. Rep. 270.]

Passengers—Contributory Negligence—Standing on Platform.*

To stand on the platform of an electric car in motion, when there is room inside, is negligence per se.

Same—Same—Same—Minors.

A boy 15 years old, who stands on the platform of a moving electric car, there being room inside, and he being of sufficient intelligence to ride on the same, in going to and from his work, is guilty of contributory negligence, preventing recovery for injuries received, caused thereby.

Appeal from Court of Common Pleas, Vernango County.

Action by Daniel F. Kirchner, by his next friend, Anthony Kirchner, against the Oil City Street Railway Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

The trial judge, on a motion to take off the nonsuit, filed an opinion in part as follows:

"What is the evidence as to the capacity or want of capacity in Daniel F. Kirchner? Dr. Coulter says that 'the boy was a good patient. He observed instructions carefully, and did as he was told. * * * I had full confidence in the boy to not run and jump, and felt safe in discharging the boy at that time.' 'Did you find the boy apt and intelligent and bright—able to understand your instructions?' 'Yes, sir; I think he is quite a bright little boy.' The father says that before the injury the boy used to go with him right along and assist about the oil wells, which the father was pumping, but that the boy was not as bright as a boy of his age ought to be, and that he couldn't tell what time it was by a watch; that he never heard any complaints from any one for whom

*See foot-note appended to *Brunnchow v. Rhode Island Co.* (R. I.), 12 R. R. R. 512, 35 Am. & Eng. R. Cas., N. S., 512.

Kirchner v. Oil City St. Ry. Co

the boy worked, and that the boy brought his money home; knew when he got his money and got the right amount, and that he (the witness) never told any of the persons for whom the boy worked that he was dull; that he got along all right at school, but not as fast as he thought he should. The mother says that she does not think that he is as bright as some of the boys she has; that it is hard to make him learn; that she doesn't think he knows anything about care. On cross-examination she says that he can read and write, but don't pick up and learn like other boys; seems as though he couldn't get along as fast as other boys; couldn't keep up with his classes, but says she can't tell in what way he isn't as bright as the general run of boys. Aside from this, it appears from the evidence of the boy that prior to the time of his injury he worked for a Mrs. Hunt in Oil City, and worked for a dairy company about a year and a half, delivering milk and butter to customers, collecting money, and getting \$3.50 per week and boarding for his services. The mother further says that he went to work at Siverly when he was seven years old, and worked for about a year or a year and a half before he went to work for the dairy."

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, and THOMPSON, JJ.

A. R. Osmer, J. H. Osmer, and N. F. Osmer, for appellant.

William J. Breene and Edmond C. Breene, for appellee.

PER CURIAM. Standing on the platform of an electric car in motion, when there is room inside, is negligence per se. *Thane v. Scranton Traction Co.*, 191 Pa. 249, 43 Atl. 136, 71 Am. St. Rep. 767; *Woodroffe v. Roxborough, etc., Ry. Co.*, 201 Pa. 521, 51 Atl. 324, 88 Am. St. Rep. 827.

An infant over the age of 14 is presumed to have capacity to be sensible of danger, and this presumption can only be overcome by clear and positive evidence of want of the capacity usual in persons of that age. *Nagle v. Allegheny Valley R. Co.*, 88 Pa. 35, 32 Am. Rep. 413; *Kehler v. Schwenk*, 144 Pa. 348, 22 Atl. 910, 13 L. R. A. 374, 27 Am. St. Rep. 633. In the case of the plaintiff, a boy over fifteen years of age, of intelligence and capacity enough to be sent out to earn his living in outside employment, and to go from and to his home in the cars, the evidence of want of capacity should be very clear indeed to absolve him from the rule as to negligence in riding on the platform. The evidence produced fell far short of the required standard.

Judgment affirmed.

ST. LOUIS, I. M. & S. RY. CO. *v.* COOLIDGE.

(Supreme Court of Arkansas, Nov. 19, 1904.)

[83 S. W. Rep. 333.]

Connecting Carriers—Delay—Liability of Initial Carrier.*

Recovery may be had of the initial carrier for injury to perishable goods, shipped over connecting lines, caused by negligent delay in transportation, though each carrier was guilty of such delay; there being no evidence that the damages were caused solely by the delay of the subsequent carriers.

Loss of Goods—Damages—Validity of Stipulation.†

Stipulation in a bill of lading that, in case of loss of the goods shipped, the measure of damages shall be their value at the point of shipment, instead of at their destination, is void, in the absence of consideration therefor.

Appeal from Circuit Court, Phillips County; Hauce N. Hutton, Judge.

Action by Henry E. Coolidge against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Dodge & Johnson, for appellant.

E. C. Hornor and Rose, Hemingway & Rose, for appellee.

HILL, C. J. The evidence fairly establishes these facts: On the evening of June 10, 1896, Coolidge delivered at Lexa, Ark., a car of potatoes, in good order, to appellant railroad, for shipment over its line to St. Louis, and thence by connecting carriers to the consignee in Chicago. The time which should have been consumed in the trip was 2 days, of which 8 hours should be allowed the Chicago & Alton Railway, the connecting carrier at St. Louis, to deliver in Chicago. The time actually consumed was about 65 hours, instead of 40, from Lexa to St. Louis, and about 15, instead of 8, from St. Louis to Chicago, and then about a day lost in Chicago in delivery after arrival. The car while in appellant's control took a side trip from Wynne to Memphis and return, which the evidence shows contributed to the delay, although contended otherwise by the appellant. The potatoes were heated and rotten when delivered to the consignee, who lost a sale at 75 cents per bushel on account of this condition. That price was the fair market price at Chicago at the time they should have arrived. The consignee put men into the car, and saved what he could from the lot, and peddled out the salable potatoes, realizing \$97 for the car load. This suit is for what they would have brought, had it not been for this damage to them. They cost at Lexa 30 cents per bushel, and were then properly packed into the car. There was no evi-

*See foot-note appended to *Johnson v. Toledo, S. & M. Ry. Co.* (Mich.), 8 R. R. 137, 31 Am. & Eng. R. Cas., N. S., 137.

†See foot-notes appended to *Lake Erie & W. R. Co. v. Holland* (Ind.), 9 R. R. 735, 32 Am. & Eng. R. Cas., N. S., 735.

St. Louis, etc., Ry. Co. v. Coolidge

dence of the condition of the potatoes from the time they left Lexa in good order till they reached the consignee rotten and heated. There is evidence that delay in transportation of potatoes at that season of the year causes them to heat and rot, and that the weather was very warm, and that the time consumed in the unnecessary trip from Wynne to Memphis and return would increase the likelihood of damage to the potatoes.

1. In the absence of evidence locating the damage to goods in transit over several connecting lines, a prima facie presumption arises that the last carrier is the negligent one. *St. Louis Southwestern Ry. v Birdwell* (Ark.) 82 S. W. 835; *Moore v. Ry.* (Mass.) 53 N. E. 816, 73 Am. St. Rep. 298; *Cote v. Ry.* (Mass.) 65 N. E. 400; *Faison v. Ry.*, 69 Miss. 569, 13 South. 37, 30 Am. St. Rep. 577; *Ry. v. Harris*, 26 Fla. 148, 7 South. 544, 23 Am. St. Rep. 551; *Ry. v. Brown* (Tex. Civ. App.) 37 S. W. 785; *Ry. v. Edloff* (Tex. Sup.) 34 S. W. 414; *Laughlin v. Ry.*, 28 Wis. 204, 9 Am. Rep. 493; *Smith v. Ry.*, 43 Barb. 225. When the initial carrier receives the goods in good order, the law presumes each successive carrier intermediate between the initial and last carrier receives them in good order; and this presumption working through to the last carrier, who delivers them in bad order, leaves the responsibility upon him, unless he can show as evidence that the damage occurred prior to his receiving them. *Ry. v. Jones*, 100 Ala. 263, 14 South. 114; *Ry. v. Harris*, 26 Fla. 148, 7 South. 544, 23 Am. St. Rep. 551; *Hutchinson on Carriers*, § 761; 6 Am. & Eng. Enc. (2d Ed.) p. 752. All of these authorities declare this presumption only arises in the absence of evidence, and its purpose is to cast the burden of proof upon the party having the knowledge or means of knowledge to ascertain the truth. The appellant invokes the presumption as a defense here. If the evidence is sufficient to show negligence in the appellant, as the initial carrier, which caused the injury, then the presumption is overcome. The difficulty in this case is in determining whether the injury was caused by the delay of the initial or the last carrier, or both. The Georgia court announced this rule in regard to perishable goods: "Unreasonable delay in forwarding fruit would be negligence, because prolonging the time within which, by the operation of natural laws, decay will be produced, and therefore such negligence would contribute to causing the damage." *Forrester v. Ry.*, 92 Ga. 699, 19 S. E. 811. In a Massachusetts case where a carrier contracted to deliver apples to a connecting carrier by a fixed time, and negligently delayed delivering them, and they froze in the possession of the connecting carrier, the court said: "If the freezing had occurred on defendant's line, it cannot be doubted that the law would regard the delay as the proximate cause of the damage. It is none the less so because it happened on a connecting line. The damage was not

caused by any extraordinary event subsequently occurring, but was caused by the event which was, according to common experience, naturally and reasonably to be expected—a change of temperature.” *Fox v. Ry.*, 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702. In the absence of a contract fixing the time for delivery to the connecting carrier, the law fixes a reasonable time; and what is a reasonable time must be determined from the length of the journey, the usual time, the weather, the nature of goods transported, etc. *Hutchinson on carriers*, § 329.

Under these authorities, which are consonant to reason and justice, the evidence is sufficient to hold the initial carrier was guilty of a negligent act—the delay in transportation of this class of goods in the season when weather conditions naturally produce delay—which caused, in whole or in part, the condition in which they reached the consignee. It is evident that the last carrier was equally or more negligent than the initial carrier, but that does not change the rule, and merely renders each or both liable, when the act of either is an efficient and proximate cause of the injury. “This rule obtains, although it is impossible to determine in what proportion each of the wrongdoers contributed to the injury, although the act alone of the party sued might have caused the entire injury, and although, if his acts had not concurred in producing the wrong, the same damages would have resulted from the act of the other.” 1 *Thompson on Negligence*, § 76. This court, in *City Electric St. Ry. v. Conery*, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262, announced this rule, as stated in the syllabus: “The concurring negligence of two parties makes both liable to a third party injured thereby, if the injury would not have occurred from the negligence of one of them only.” It is impossible from this evidence, and likely from any evidence, to ascertain that the injury was caused solely by one of the carriers; and, finding both guilty of an efficient and proximate cause therefor, either or both must be held, unless the party guilty of such negligence can show and does show that its negligence did not produce, in whole or in part, that result which follows naturally and proximately from the negligent act.

2. The appellant claims the verdict is excessive. That depends on the measure of damages. Shall it be taken to be at Chicago at the time the goods were due there, or shall it be controlled by the bill of lading, which stipulates that the value of the same at point of shipment shall determine the measure in the event of loss of the goods? Conceding, without deciding, that loss of goods includes loss in value, does the contract control? It cannot be disputed that, in the absence of this contract, the legal liability would be for the price at Chicago at the time the potatoes were due there. *Ry. v. Mudford*, 48 Ark. 502, 3 S. W. 814; *Ry. v. Phelps*, 46

O'Reilly v. Brooklyn Heights R. Co

Ark. 485; Ry. v. Johnson, 85 Ga. 497, 11 S. E. 809; Fox v. Ry., 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702; Hutchinson on Carriers, § 767; Ray on Imposed Duties of Freight Carriers, p. 1036. Contracts restricting the liabilities imposed on carriers by law are only valid where fair and reasonable, and upon a consideration—usually a reduced rate of freight in consideration of the release from given legal liabilities. Ry. v. Cravens, 57 Ark. 112, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. Rep. 230; Ry. v. Spann, 57 Ark. 127, 20 S. W. 914. This rule is applied to contracts fixing a given value in case of loss. Ry. v. Lesser, 46 Ark. 236; Ry. v. Weakley, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104; Zouch v. Ry. (W. Va.) 15 S. E. 185, 17 L. R. A. 116; Ray on Imposed Duties of Freight Carriers, § 13. These principals and authorities control, and without a consideration this clause of the contract is void. Applying the Chicago price at the measure, deducting the \$97 for the damaged goods, allowing 6 per cent. interest from date of due delivery, and the verdict is a trifle less than it might be.

The judgment is affirmed.

O'REILLY v. BROOKLYN HEIGHTS R. CO.

(Court of Appeals of New York, Nov. 29, 1904.)

[72 N. E. Rep. 517.]

Surface Railroads—Leased Lines—Transfers.

Where a street surface railroad is operated under the railroad law (Laws 1890, p. 1082, c. 565, as amended by Laws 1892, p. 1382, c. 676), and leases other roads which intersect with its own road, the lessee must, under section 104, c. 676, p. 1406, Laws 1892, carry any passenger desiring to make one continuous trip to any portion of any railroad embraced in such contract for a single fare.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Luke O'Reilly against the Brooklyn Heights Railroad Company. From a judgment of the Appellate Division (89 N. Y. Supp. 41) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Charles A. Collin, William F. Sheehan, and John L. Wells, for appellant.

Louis Ehrenberg, for respondent.

PER CURIAM. The plaintiff was a passenger upon the Vanderbilt Avenue Line of the Nassau Electric Railroad Company, and had paid his fare of five cents. He demanded a transfer ticket over the Brooklyn City Railroad Company's line from its intersection with the Vanderbilt Avenue Line, in the city of Brooklyn, which was refused, and this action was brought to recover the penalty given by the statute

therefor. The history of the legislation upon the subject and at the construction of the various enactments pertaining thereto are covered by our opinion in the case of *Griffin v. Interurban Street Railway Company*, 179 N. Y. 438, 72 N. E. 513. That opinion covers all of the points involved herein, with one exception. It is now contended on behalf of the appellant that the Brooklyn City Railroad Company, over which the plaintiff demanded a transfer, was not a railroad "embraced in such contract" of the defendant company, within the meaning of section 104 of the railroad law (Laws 1890, p. 1114, c. 565, as amended by Laws 1892, p. 1406, c. 676). The defendant, the Brooklyn Heights Railroad Company, was operating the Brooklyn City Railroad and the Vanderbilt Avenue Line of the Nassau Electric Railroad Company under two separate leases, one executed in 1893 and the other in 1900. The statute provides that: "Every such corporation entering into such contract shall carry or permit any other party thereto to carry between any two points on the railroads or portions thereof embraced in such contract any passenger desiring to make one continuous trip between such points for one single fare, not higher than the fare lawfully chargeable by either of such corporations for an adult passenger. Every such corporation shall upon demand, and without extra charge, give to each passenger paying one single fare a transfer, entitling such passenger to one continuous trip to any point or portion of any railroad embraced in such contract, to the end that the public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare." It is contended that the railroad lines of the Nassau Electric Railroad Company are not embraced in the lease made by the Brooklyn City Railroad Company to the defendant, and that the Brooklyn City Railroad Lines are not embraced in the lease made by the electric railroad company to the defendant, and therefore there is no obligation on the part of the defendant to grant transfers from one of those lines to the other. In order to determine this question, we think it important to first consider the nature of the obligation of the defendant company, arising under the statute, upon its executing the lease of the Brooklyn City Railroad Company. It will be observed that the language of the statute is that "every such corporation entering into such contract shall carry," etc. The obligation to carry, therefore, arises from the entering into the contract. The defendant company was the lessee, and entered into the contract with the lessor, thereby undertaking to operate the roads of the lessor company. When a street surface railroad company, engaged in the operation of a railroad under the statute, leases another railroad, and commences to operate the same, which roads intersect each other, the evident purpose of the act was that they should be

deemed "embraced" in the contract, and that passengers should be transferred from one road onto the other so as to entitle "such passenger to one continuous trip to any point or portion of any railroad embraced in such contract, to the end that the public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare." We think, therefore, that a fair and reasonable construction of the statute is that the lessee railroad, in taking a lease of another railroad, undertakes to transfer passengers from its own line to that of the leased line, and vice versa. If we are correct in this construction, it would then follow that when the defendant company subsequently leased the Vanderbilt Avenue Line of the Nassau Railroad Company it undertook to transfer passengers from the Vanderbilt Avenue Line over its own road, and thence, by its former lease, to transfer passengers over the Brooklyn City Lines, and vice versa. In other words, the roads leased by the defendant company in effect became the roads of that company operated by it, and when it leased other roads and commenced their operation the obligation was to transfer passengers over all the roads operated by it for a single fare.

The judgment should be affirmed, with costs.

CULLEN, C. J., and BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur. GRAY, J., not sitting.
Judgment affirmed.

GRIFFIN v. INTERURBAN ST. RY. CO.

SCUDDER v. SAME.

(Court of Appeals of New York, Nov. 29, 1904.)

[72 N. E. Rep. 513.]

Street Railways—Transfers—Penalties—Liability of Lessees—Statutes.

Laws 1890, p. 1106, c. 565, § 78, as amended by Laws 1892, p. 1398, c. 676, provides that any railroad corporation may contract with any other for the use of their respective roads, and if such contract shall be a lease, certain formalities are to be observed in its execution. Section 104 (page 1114) provides for transfers from one road to another upon payment of a single fare: *held*, that the latter section applies to surface lines leased by one or more corporations to another, and operated by the lessee, so as to render the lessee liable where transfers are tendered and refused for the penalties provided for their refusal.

Same—Same—Same—Waiver.

The penalties provided for on refusal of transfer on payment of a single fare from one to another of leased surface railroads, under Laws 1890, p. 1082, c. 565, as amended by Laws 1892, pp. 1398, 1406, c. 676, §§ 78, 104, are not cumulative, and the bringing of an action for one penalty is a waiver of all previous penalties incurred.

Appeals from Supreme Court, Appellate Division, First Department.

Actions by William Griffin against the Interurban Street

Griffin v. Interurban St. Ry. Co

Railway Company and by Frank S. Scudder against the same. From judgments of the Appellate Division (89 N. Y. Supp. 1105) affirming a judgment of the Appellate Term affirming a judgment in favor of plaintiffs, defendant appeals. Modified.

Paul D. Cravath, Charles F. Brown, Joseph P. Cotton, Jr., and Henry A. Robinson, for appellant.
Harcourt Bull, for respondents.

BARTLETT, J. These actions were brought to recover penalties alleged to have been incurred by reason of defendant's refusal to transfer the plaintiffs, while passengers on its railway system, from one of its lines to another, as required by law. In the Griffin case the plaintiff seeks to recover \$200, for four penalties of \$50 each. The plaintiff is in the piano business, and engaged in tuning, repairing, and regulating pianos, which employment requires him to go to New Jersey almost every day in the year. In June and July, 1903, he resided on Lenox avenue, in the city of New York, near 134th street. In going to New Jersey he took the Lenox Avenue Line and transferred to the 125th Street Crosstown Line. In coming from New Jersey he took the 125th Street Crosstown Line and transferred to the Lenox Avenue Line. On each of the said four occasions plaintiff paid to the conductor the single fare of five cents, requesting at the same time that a transfer be given him for the second line. On each occasion the transfer was refused, and plaintiff was compelled to pay a second fare of five cents, after having stated all the facts to the conductor. These trips, so taken by the plaintiff, were in the prosecution of his business. In the Scudder case the plaintiff seeks to recover \$250, or five penalties of \$50 each. In this case the lines involved are the 125th Street and Amsterdam Avenue Lines. Plaintiff is a minister of the Gospel. In June and July, 1903, he resided at the corner of 117th street and Amsterdam avenue. On June 29, June 30, and July 1, 1903, he made five continuous trips in the cars operated by the defendant on Amsterdam avenue and on 125th street, in the borough of Manhattan, in the city of New York. On each of the said trips he made payment of the single fare, and demanded that a transfer should be given to the plaintiff for the second line. In each case the transfer was refused, and in each case the plaintiff was compelled to pay a second fare of five cents, after having stated all the facts to the conductor. The plaintiff was not riding for the purpose of obtaining a cause of action against the company, but in the prosecution of his profession.

There are two leases, under the provisions of which the defendant company was operating the lines of a street surface railroad on 125th street, Lenox avenue, and Amsterdam avenue, over which plaintiffs, Griffin and Scudder, made their continuous trips. One of these is the lease from the

Third Avenue Railroad Company to the Metropolitan Street Railway Company, made in April, 1900; the other is the lease from the Metropolitan Street Railway Company to the Interurban Street Railway Company, the defendant, made in April, 1902. The only street surface railroad owned by the defendant is a line of railroad at Mt. Vernon, wholly outside the city of New York.

The first and important question involved in these cases is whether present section 104 of the railroad law (Laws 1892, p. 1406, c. 676) was intended by the Legislature to apply to the case of a lease by one railroad of the line of another. This question has been litigated in the courts below in a number of cases, and the judges, with nearly a unanimous vote, have decided that section 104 of the railroad law covers the case of a lease by one company to another. These litigations have resulted in a number of well-considered opinions expressing the majority view, and it would be unnecessary at this time to restate the arguments that are there so ably set forth, were it not for the fact that the learned Appellate Division handed down no prevailing opinions save a reference to its decisions in other cases. It therefore sees proper that a brief reference should be made to the statutory argument. In 1839 the Legislature passed an act "authorizing railroad companies to contract with each other." Laws 1839, p. 195, c. 218. This act contained a single section, reading as follows: "It shall be lawful hereafter for any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract. But nothing in this act contained shall authorize the road of any railroad corporation, to be used by any other railroad corporation, in a manner inconsistent with the provisions of the charter of the corporation whose railroad is to be used under such contract." Inasmuch as the general railroad law of 1850 (Laws 1850, p. 211, c. 140) did not in terms authorize the leasing of one railroad to another, it was a mooted question whether such power existed. In *Woodruff v. Erie Railway Co.*, 93 N. Y. 609, 616, this court said, referring to the act of 1839: "This act has never been repealed, and has been held by this court to confer power upon railroad corporations, not only to acquire, but also to transfer to other railroad corporations, by lease, the exclusive right to use and enjoy the property privileges of the lessor in such contract. *Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 644; *People v. Albany & Vt. R. R. Co.*, 77 N. Y. 232; *Troy & B. R. R. Co. v. B., H. T. & W. Ry. Co.*, 86 N. Y. 107." This case was decided in November, 1883. It will be observed that from 1839 to 1883, continuously, the power to lease existed. In 1884 the Legislature passed an act "to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof in

Griffin v. Interurban St. Ry. Co

cities, towns and villages." Laws 1884, pp. 309, 314, c. 252. Section 15 of this act reads as follows: "It shall be lawful for any street surface railroad company or companies to lease, or to transfer its or their right, subject to all its or their obligations in respect thereof, to run upon or to use any portion of its or their railroad tracks to any other street surface railroad company authorized to run upon such route, upon such terms as may be agreed upon by a majority of the respective boards of directors thereof," etc. In 1885 the Legislature passed an act "authorizing street surface railroad companies to contract with each other, and providing for a proper system of transfer of passengers." Laws 1885, p. 525, c. 305. The material portions of the above act are as follows: "Section 1. It shall be lawful hereafter for any street surface railroad company, or any corporation owning or operating a street surface railroad or railroad route, to contract with any other such company or corporation for the use of their respective roads or routes or any portion thereof, subject to the provisions, restrictions and conditions hereinafter stated, and thereafter to use or to permit the use of the same in such manner as may be prescribed in such contract." (Remainder of section not material.) "Sec. 2. The directors of the companies may enter into such a lease or contract under the corporate seal of such company, such lease or agreement prescribing the terms and conditions thereof." Section 3 provides for lease or agreement to be submitted to vote of stockholders, vote to be taken by ballot, lease to be filed and recorded. "Sec. 4. Each and every company entering into any contract under the power conferred by this act shall carry or permit any other party to such contract to carry between any two points on the railroads or portions thereof embraced within such contract, any passenger desiring to make one continuous trip between such points for one single fare not higher than the fare lawfully chargeable by either of such companies for an adult passenger; and each and every such company shall, upon demand and without extra charge, give to each passenger paying one single fare a transfer entitling such passenger to one continuous trip to any point or any portion of any railroad embraced within such contract, to the end that the public convenience may be promoted by the operation of the railroads embraced within such contract to the extent of their inclusion therein substantially as a single railroad with a single rate of fare. For every refusal to comply with the requirements of this section the company so refusing, and having contracted as aforesaid, shall forfeit to the aggrieved party the sum of fifty dollars, which may be recovered in any court of competent jurisdiction. This act shall not apply to cities having less than eight hundred thousand population." Section 5 repealed all acts and parts of acts inconsistent with the provisions of this act. In 1889 the Legislature passed an act to amend

chapter 305, p. 525, of the Laws of 1885 (Laws 1889, p. 730, c. 532). This amendment related to section 3 of the act, and permitted it to stand, adding thereto provisions authorizing the abandonment of part of a route, and providing therefor in detail. On May 1, 1891, the railroad law went into effect. Chapter 565, p. 1082, Laws 1890. The law of 1889 was substantially embraced in section 78 of the new revision (Laws 1893, p. 907, c. 433), while the provision of the railroad law of 1890 against the leasing of parallel lines was continued and made general by section 80, p. 1107. The first section of the act of 1885 was continued as section 103 (page 1114); the third section as section 104; while the fourth section, establishing the public right of free transfer, was continued substantially in section 105.

In 1892 the Legislature passed an act "to amend the Railroad Law." Laws 1892, p. 1382, c. 676. The changes made in this revision seem to have resulted in confusion and misunderstanding in judicial opinions and in the briefs of counsel. The limitation referring to cities of 800,000 population or over was stricken out. Sections 103 and 104, which provided, respectively, that corporations may lease or contract with each other for use of road and for the submission of such contract to the vote of stockholders, were repealed, and substantially consolidated with section 78, which reads as follows (Laws 1893, p. 907, c. 433, § 2, amending section 78): "Any railroad corporation or any corporation owning or operating any railroad or railroad route within this state, may contract with any other such corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract. Such contract may provide for the exchange or guarantee of the stock and bonds of either of such corporations by the other and shall be executed by the contracting corporations under the corporate seal of each corporation, and if such contract shall be a lease of any such road and for a longer period than one year, such contract shall not be binding or valid unless approved by the votes of stockholders owning at least two-thirds of the stock of each corporation which is represented and voted upon in person or by proxy at a meeting called separately for that purpose upon a notice stating the time, place and object of the meeting, served at least thirty days previously upon each stockholder personally, or mailed to him at his post-office address, and also published at least once a week, for four weeks successively, in some newspaper printed in the city, town or county where such corporation has its principal office, and there shall be indorsed upon the contract the certificate of the secretaries of the respective corporations under the seals thereof, to the effect that the same has been approved by such votes of the stockholders, and the contract shall be executed in duplicate and filed in the offices where the certifi-

cates of incorporation of the contracting corporations are filed. The road of a corporation cannot be used under any such contract in a manner inconsistent with the provisions of law applicable to its use by the corporation owning the same at the time of the execution of the contract. Such contract shall be executed by the corporations, parties thereto, and proved and acknowledged in such manner as to entitle the same to be recorded in the office of the clerk or register of each county through or into which the road so to be used shall run. Nothing in this section shall apply to any lease in existence prior to May 1, 1891." The new section 103 was introduced, dealing with the abandonment of part of route, which is not material at this time. Old section 105 (section 4, Laws 1885, p. 526, c. 305, already quoted), which dealt with the subject of contracting corporations to carry passengers for one fare, and fixing a penalty for a violation of that duty, was moved up, and renumbered section 104, with slight verbal changes, and reads as follows: "Every such corporation entering into such contract shall carry or permit any other party thereto to carry between any two points on the railroads or portions thereof embraced in such contract any passenger desiring to make one continuous trip between such points for one single fare, not higher than the fare lawfully chargeable by either of such corporations for an adult passenger. Every such corporation shall upon demand, and without extra charge, give to each passenger paying one single fare a transfer, entitling such passenger to one continuous trip to any point or portion of any railroad embraced in such contract, to the end that the public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare. For every refusal to comply with the requirements of this section the corporation so refusing shall forfeit fifty dollars to the aggrieved party. The provisions of this section shall only apply to railroads wholly within the limits of any one incorporated city or village."

It is quite manifest from this review of the legislature bearing on the controversy that present section 104 of the railroad law covers leases duly executed between street surface railroad companies, and particularly the leases now under review. It is obvious, in the language of present section 104, "every such corporation entering into such contract," etc., that the word "such," in that connection, refers to "any railroad corporation or any corporation owning or operating any railroad or railroad route within this state," which is the language of section 78 as amended. It is claimed in this connection by the appellants that section 78 of the railroad law can only mean the roads or routes which the corporations respectively own, and does not apply to a corporation organized for the purpose of operating the lines of other railroad companies under lease. Sec-

tion 78 in express terms refers to any railroad corporation—"or any corporation owning or operating" any railroad or railroad route within this state may contract, etc. No arguments seems necessary in view of the positive provisions of the railroad law. Sections 78 and 104 must be read together. In some of the cases in the lower courts, in construing section 104 in regard to the liability of companies under lease to grant transfers to passengers, the meaning of the words in that connection, "to the end that the public convenience may be promoted by the operation of railroads embraced in such contract substantially as a single railroad with a single rate of fare," have been construed as a legislative intimation that certain transfers might be demanded that would not be required in seeking to promote the public convenience. In the cases before us this language establishes the propriety of the transfers demanded. We are of opinion that the transfer in each case was improperly refused, and the defendant incurred the penalty provided by section 104 of the railroad law.

There is a second question in these cases that was not orally argued, but is discussed in the briefs of counsel, which is as follows: Can a plaintiff, seeking to recover penalties under section 104 of the railroad law, join in his complaint more than one penalty? The provision of section 104 of the railroad law, relating to this subject, reads as follows: "For every refusal to comply with the requirements of this section, the corporation so refusing shall forfeit fifty dollars to the aggrieved party." It is no doubt the rule, to be deduced from the decisions of this court, that no action for cumulative penalties is permissible unless it is clear from the language of the act inflicting the penalty that it was the intention of the Legislature to provide a penalty for each and every violation of the statute. In *People v. New York Central R. R. Co.*, 13 N. Y. 78, this court allowed cumulative penalties under section 39 of the general railroad act of 1850 for sundry omissions to ring a bell or sound a steam whistle on engines upon approaching and crossing a highway. The statute in that case contained the words "for every neglect." In *Suydam v. Smith*, 52 N. Y. 383, cumulative penalties were allowed where a statute contained the words "for each offense." In that case Judge Rapallo (page 388) distinguished the case of *Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 644, pointing out that the act there construed did not contain words indicating that the Legislature intended to permit a recovery for each offense. In *Sturgis v. Spofford*, 45 N. Y. 446, a cumulative recovery was disallowed, the legislative intent not appearing in the language of the statute. In *Grover v. Morris*, 73 N. Y. 473, a cumulative recovery was permitted. The offense was the sale of tickets in an illegal lottery. Each sale of a ticket was visited with a penalty, and it was held that it was proper to unite in a single action claims to recover back moneys paid on several

Welch v. Boston Elevated Ry. Co

separate purchases. Cumulative recoveries have not been permitted in two recent decisions in this court, where the legislative intention was not to be found in the statute under construction. *Jones v. Rochester Gas & Electric Co.*, 168 N. Y. 65, 60 N. E. 1044; *Cox v. Paul*, 175 N. Y. 328, 67 N. E. 586.

Referring once more to the language of section 104 of the railroad law imposing the penalty, we find the single sentence in which it is contained opening with the words, "For every refusal to comply." It is quite obvious that the legislative intention to permit the recovery of cumulative penalties for refusals of the defendant to comply with the provisions of the railroad law in regard to the transfer of passengers is as clearly manifested as in any of the cases cited. Notwithstanding this fact, a majority of my brethren are of opinion that, while the rule for the recovery of cumulative penalties, as already adverted to, is firmly established by the earlier decisions of this court, yet the changed conditions in the modern life in our great cities render its modification imperative. There has been present at the bar of this court civil and criminal cases where the aggregate penalties sought to be recovered have amounted to enormous and wellnigh appalling sums by reason of plaintiffs permitting a long period to elapse before beginning actions. Actions of this nature have become highly speculative, and present a phase of litigation that ought not to be encouraged. The court is of opinion that, if cumulative recoveries are to be permitted, the Legislature should state its intention in so many words; that a more definite form of statement be substituted for the words hitherto deemed sufficient. We intend no reflection upon the plaintiffs in the cases now under consideration, but are dealing with a great abuse which demands immediate correction. A sound public policy requires that only one penalty should be recovered in a single action, and that the institution of an action for a penalty is to be regarded as a waiver of all previous penalties incurred.

It follows that, in each of the actions before us, the judgment should be modified and reduced so as to permit a recovery for one penalty only, without costs to either party.

CULLEN, C. J., and HAIGHT, MARTIN, VANN, and WERNER, JJ., concur. GRAY, J., not sitting.

Judgment accordingly.

WELCH v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, Dec. 9, 1904.)

[72 N. E. Rep. 500.]

Carriers—Injuries to Passengers—Negligence—Evidence—Sufficiency.
In an action for injuries received by a passenger on an elevated rail-

Welch v. Boston Elevated Ry. Co

road train while passing between cars, evidence held insufficient to show any negligence on the part of defendant.

Exceptions from Superior Court, Suffolk County; Albert Mason, Judge.

Suit for personal injuries by Ellen B. Welch against the Boston Elevated Railway Company. A verdict was directed for defendant, and plaintiff excepted. Exceptions overruled.

The injuries were alleged to have been received by plaintiff on February 8, 1902, while a passenger on an elevated train of defendant. The plaintiff testified that she entered the Scollay Square Station for south-bound trains about 5 o'clock in the afternoon on February 8, 1902. She boarded the front platform of the last car of the train, and took a step or two in that car before she discovered that it was the smoking car. She then turned, and started across to the next car ahead, and while crossing between the cars her left leg went down in the space between the cars to her knee, and she fell, receiving the injuries complained of. There were several people ahead of her, and she did not see the space. She saw no guard or other employee of the defendant on either of the car platforms before she fell. The train was standing at the station on a curve which made the space between the cars wider than when the cars were on a straight rail. There was no other testimony as to the width of the space between the cars. On cross-examination the plaintiff testified that she did not look down to see how great a space there was between the cars as she was crossing. The plaintiff's testimony was corroborated by her daughter, who was with her, and there was no other testimony as to the happenings of the accident. At the close of the plaintiff's case the defendant requested the court to rule that upon this evidence the plaintiff was not entitled to recover. The court so ruled, and directed a verdict for the defendant.

Burns & Clark and J. F. Lynch, for plaintiff.

Russell A. Sears and Hugh Bancroft, for defendant.

PER CURIAM. The testimony of the plaintiff and her daughter furnished no evidence of negligence on the part of the defendant. It is at least very questionable whether there was any evidence that the plaintiff was in the exercise of due care.

Exceptions overruled.

DU BOSE *v.* LOUISVILLE & N. R. CO.

(Supreme Court of Georgia, Nov. 12, 1904.)

[48 S. E. Rep. 913.]

Carriers—Breach of Contract of Carriage.

A railroad company is under no legal duty to receive and transport passengers on a special train made up and used for the purpose of going to and returning from a wreck on the company's line. One who, with full knowledge of the circumstances, contracts with the conductor to be carried as a passenger on such train to and from the wreck, and who pays fare for his passage in going, has no right to an action *ex delicto* against the company for its breach of the contract to furnish him return transportation. *Louisville & Nashville R. Co. v. Du Bose*, 47 S. E. 917, 120 Ga. 339; *Louisville & Nashville R. Co. v. Spinks*, 12 Am. & Eng. R. Cas., N. S., 48, 30 S. E. 968, 104 Ga. 692.
(Syllabus by the Court.)

Error from Superior Court, Taliaferro County; H. M. Holden, Judge.

Action by J. R. Du Bose against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

F. H. Colley, for plaintiff in error.

Jos. B. & Bryan Cumming, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur, except EVANS, J., disqualified.

GEORGIA, C. & N. RY. CO. et al. *v.* HUTCHINS.

(Supreme Court of Georgia, Nov. 12, 1904.)

[48 S. E. Rep. 939.]

Carriers—Injuries to Licensee—Evidence.*

This case is controlled by the decisions in *Coleman v. Georgia R. Co.*, 10 S. E. 498, 84 Ga. 1, and *McLarin v. Atlanta R. Co.*, 11 S. E. 840, 85 Ga. 504.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; R. B. Russell, Judge.

Action by J. R. Hutchins against the Georgia, Carolina & Northern Railway Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

Erwin & Erwin, T. M. Peeples and N. L. Hutchins, for plaintiff in error.

Juhan & McDonald, for defendant in error.

*As to contributory negligence in alighting from moving cars or trains, see foot-note appended to *Simmons v. Seaboard Air Line Ry.* (Ga.), 11 R. R. R. 454, 34 Am. & Eng. R. Cas., N. S., 454; foot-note appended to *Paganini v. North Jersey St. Ry. Co.* (N. J.), 11 R. R. R. 14, 34 Am. & Eng. R. Cas., N. S., 14.

Georgia, etc., Ry. Co. v. Hutchins

SIMMONS, C. J. Suit for damages for personal injuries was brought by Hutchins against certain railroad companies. The evidence, taken most strongly in favor of the plaintiff, showed that he had gone to the railroad station at Lawrenceville with some persons who intended to take passage on one of the defendants' trains. These persons were one Oliver and his wife and children. When the train arrived, there were some 25 or 30 persons waiting to take passage thereon. Oliver asked plaintiff to assist him in putting Mrs. Oliver on board. This request was made in a "mild" tone, but the conductor of the train was standing near, and might have heard it. After waiting for part of the crowd to get on board, plaintiff and Mrs. Oliver followed. They found a seat about the middle of a car, and then plaintiff went back to the platform to leave the train. By this time the train was in motion. The conductor was not in the car. Plaintiff found several persons between him and the steps on which he had entered the car, and he endeavored to leave it from the other side of the platform. He could not do this, however, as the train was vestibuled, and the door on that side was closed and fastened. He then went to the steps on the side from which he had entered. The train was moving rapidly and with increasing speed. As he jumped off, there was a jerk, which threw him down. He fell at a point some 50 to 70 feet from where he had embarked, and received certain injuries to his wrist. There was also evidence that the conductor told the crowd at the train not to be in too much of a hurry; that he would give them all plenty of time to get aboard. It further appeared that on account of the large amount of baggage to be loaded the train remained at the station a little longer than usual. The jury found for the plaintiff, and the defendants moved for a new trial. The motion was overruled, and the movants excepted.

The evidence demanded a verdict for the defendants. Even if the jury could properly have inferred that the conductor heard Oliver request plaintiff to assist Mrs. Oliver to board the train, there was absolutely nothing to put the conductor or any other agent of the defendants upon notice that the plaintiff intended to disembark at the same station. The conductor denies having heard the request, but, even had he done so, he might well have believed that the plaintiff was one of the persons who intended to take passage on the train; that he was merely assisted a fellow passenger, and intended to remain in the car. There being nothing to put the defendants upon notice of plaintiff's intention, they were not bound to hold their train until he had time to disembark, nor to notify him before the train was started. *Coleman v. Georgia R. Co.*, 84 Ga. 1, 10 S. E. 498; *McLarin v. Atlanta R. Co.*, 85 Ga. 504, 11 S. E. 840. Indeed, the cases just cited are controlling in the present case, and under them the plaintiff cannot recover. Even had the defendants been negligent, we think

Hilton Lumber Co. v. Atlantic Coast Line R. Co

that the injury was not proximately caused by such negligence, but by the negligence of the plaintiff in attempting to alight from a rapidly moving train with full knowledge that it was in motion. *Simmons v. Seaboard Air-Line Railway*, 120 Ga. 225, 11 R. R. R. 454, 24 Am. & Eng. R. Cas., N. S., 454, 47 S. E. 570. For these reasons we think that the trial judge erred in refusing a new trial.

Judgment reversed. All the Justices concur.

HILTON LUMBER CO. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina, Nov. 15, 1904.)

[48 S. E. Rep. 813.]

Railroads—Discrimination—Contract for Reshipment.*

Under Laws 1899, p. 301, c. 164, § 13, providing that any carrier charging one person more than another for the same service is guilty of discrimination, a railroad carrying raw material to factories cannot charge a factory which agrees to ship the manufactured product by the same road less for the same service than it charges a factory which will make no such agreement.

Appeal from Superior Court, New Hanover County; Brown, Judge.

Action by the Hilton Lumber Company against the Atlantic Coast Line Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

*As to what does, and does not, constitute discrimination on the part of a carrier of freight, see foot-note appended to *Laurel Cotton Mills v. Gulf & S. I. R. Co.* (Miss.), 12 R. R. R. 471, 35 Am. & Eng. R. Cas., N. S., 471 (within meaning of interstate commerce act); *Cohn v. St. Louis, etc., Ry. Co.* (Mo.), 11 R. R. R. 47, 34 Am. & Eng. R. Cas., N. S., 47 (long and short haul); *Southern Ry. in Kentucky v. Commonwealth* (Ky.), 9 R. R. R. 837, 32 Am. & Eng. R. Cas., N. S., 837 (provision of Kentucky Const. prohibiting discrimination does not prohibit a railroad from charging through rate which is less than the sum of the local rates between two points); *Commonwealth v. Chesapeake & O. R. Co.* (Ky.), 7 R. R. R. 184, 30 Am. & Eng. R. Cas., N. S., 184 (construction of long and short haul clause of Kentucky constitution); *Memphis News Pub. Co v. Southern R. Co.* (Tenn.), 8 R. R. R. 202, 31 Am. & Eng. R. Cas., N. S., 202 (illegal discrimination in carrying newspapers); *Harp v. Choctaw, O. & G. R. Co.* (C. C. A.), 9 R. R. R. 823, 32 Am. & Eng. R. Cas., N. S., 823 (validity of regulations for receiving freight as affected by fact that they discriminate, with respect to facilities, against those who do not comply with them. And the furnishing of cars to mine owners to be loaded on their spur tracks, while refusing, according to carrier's regulations, to furnish cars for loading on the station track to plaintiff, who had no spur track, did not constitute the giving of an undue preference, either under the common law or the statute of Arkansas); *Commonwealth v. Louisville & N. R. Co.* (Ky.), 6 R. R. R. 13, 29 Am. & Eng. R. Cas., N. S., 13 (under Const. of Ky., § 215, a company may charge more for shipping a high grade coal than for shipping a low grade coal); *Louisville & N. R. Co. v. Walker* (Ky.), 21 Am. & Eng. R. Cas., N. S., 473 (Kentucky Const., § 218, is not applicable where short haul originates on branch line and long haul is altogether on main line).

Rountree & Carr, for appellant.

Junius Davis, for appellee.

CLARK, C. J. The gist of this action is for discrimination by the defendant in charging the plaintiff a higher rate on logs to the plaintiff's mill in Wilmington than was charged others for like service, and to recover the overcharges, which had been paid under protest. The point presented is not that the rate (\$2.50 per thousand feet in car-load lots) charged the plaintiff is per se unreasonable, but that the rate charged others for the same service for the same distance was \$2.10, and that this is a serious discrimination, which, if continued, will result in the crippling or destruction of the plaintiff's mill, and the building up of other mills which are in competition with the plaintiff, for it has in five months amounted to \$3,900, for the recovery of which this action is brought.

The court charged the jury: "If you find that the rate of \$2.10 per thousand feet was charged and collected by the defendant upon logs shipped over any part of its railroad to a mill or mills at which logs were manufactured into lumber, and the lumber itself reshipped over the railroad of the defendant, or any part of it, and that the reduced rate of \$2.10 per thousand feet was given to such mill in consideration of such fact that they would ship the lumber manufactured out of the said logs over the line of the defendant's road, which said agreement was open to all mills that wished to accept it, then it would not be an unjust or illegal discrimination to charge \$2.50 per thousand feet, which it is not contested is a reasonable rate to mills which did not ship their manufactured lumber over the line of the defendant road." The proposition herein stated is that a common carrier has a right to charge one person a lower rate of freight than another for shipping the same quantity the same distance, under the same conditions, provided the shipper give the company a consideration (shipping the manufactured lumber subsequently over its line) which its managers think will make good to it the abatement of rate given to such parties. But if this is equality as to the treasury of the company, it is none the less a discrimination against the plaintiff. It is charged \$2.50 while others are charged \$2.10 for the same service. It is true, if the plaintiff should choose to agree to ship its manufactured lumber out of Wilmington over the defendant's line, it could get the same reduction of rate on its logs into Wilmington. On those conditions it could save itself from being discriminated against. But suppose the plaintiff should wish to sell its lumber in Wilmington, or can ship it by a lower rate by sea, or even by a competing railroad line out of Wilmington, has it not the right to do so? Should it see fit to exercise that right, has the common carrier the power to place a penalty of a 19 per cent. higher rate on the plaintiff, and to charge it \$2.50 for bringing its logs to Wil-

Hilton Lumber Co. v. Atlantic Coast Line R. Co

Wilmington, when it charges others \$2.10 for exactly the same service?

The principle involved is a vital one to the public at large, for upon this alleged right to discriminate by common carriers, exercised either openly or secretly by rebates, nearly all trusts, and especially the Standard Oil Company, have been built up to their present disquieting and menacing predominance, as has been fully shown by the investigation and report of the Industrial Commission and the Interstate Commerce Commission, both appointed by acts of Congress. Under the same idea that the test was the fact that the railroad company would not lose by the favor, extended in the present case by charging certain shippers \$2.10 while charging the plaintiff \$2.50, another railroad company charged the Standard Oil Company 10 cents per barrel while charging its competitors 35 cents per barrel, and paying 25 cents of the 35 cents thus collected to the Standard Oil Company. *Handy v. Railroad (C. C.)* 31 Fed. 689. The railroad company in that instance must have found its offset, its profit, somewhere, or it would not have made that arrangement. But what became of the competitors of the Standard Oil Company? Here the railroad company would doubtless make up, out of its forced monopoly of shipping out of Wilmington the lumber to be manufactured out of all the logs hauled in by it, the 40 cents which is deducted in favor of those who will give it that monopoly. But why should it discriminate by charging the plaintiff \$2.50 instead of \$2.10; i. e., charge 19 per cent. higher rates upon logs which when turned into lumber are sold in Wilmington, or shipped by sea, or shipped by a competing route? It cost no more to bring in the plaintiff's logs than the logs for whose hauling only \$2.10 was charged. The shipment of logs to Wilmington is one transaction. The shipment of lumber out is another. The defendant cannot charge the plaintiff higher on the logs because it will not agree to ship its lumber by the defendant's line. It is no answer to say that, if the plaintiff will come to the defendant's terms, it will get the same discount. The defendant might as well say, "If you will carry your logs to a sawmill in which the railroad company is a large owner, you will get 16 per cent. reduction in freight on your logs, and there is no discrimination, for the same offer is open to you as to others." If the plaintiff, like others, was shipping logs to Wilmington with the voluntary intention of shipping by the defendant's road, say to New York, then certainly there would be no discrimination. But the plaintiff does not wish to ship to New York over the defendant's line, and the defendant proposes "to put the screws to the plaintiff," and make it do so, whether it wishes to do so or not; and, if the plaintiff does not do so, the defendant says the plaintiff cannot be treated as well as others as to the rates for hauling its logs, but must pay nearly one-fifth (19 per cent.) higher rates

on its logs. That is the very point at issue. Hauling its logs to Wilmington is the only service the plaintiff seeks at the defendant's hands. Why should it pay higher for that service than those who agree to carry their logs to the defendant's mill, or to ship out their lumber by the defendant's road.

Discrimination is a more dangerous power than high rates, if the latter is charged impartially to all. Hence the statutes of Congress and of the state, while leaving the fixing of rates in the hands of commissions, have directly and strictly forbidden, under penalties, any discrimination. Common carriers are fixed with a public use. They exercise a branch of the public franchise. They can condemn rights of way solely because the land "is taken for a public use." They are subject to governmental supervision, and to the reduction or regulation of their charges by the Legislature directly, or by commissioners appointed by its authority. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, and citation to same, 9 Rose's Notes, 21-55. In all the great countries of the world, except England and this country, the railroads are largely or altogether owned and operated directly by the government, as was formerly the case in North Carolina. In all countries alike it is recognized that it is of vital importance that corporations exercising such public use must be absolutely impartial and equal in their charges for the same service. All the service the plaintiff asks of the defendant is to haul its logs to its sawmill in Wilmington. For this it charges the plaintiff \$2.50. It charges others \$2.10; i. e., 19 per cent. higher to the plaintiff than to others for exactly the same service. It costs the defendant no more to render that service to the plaintiff than to render the same service to others. It must charge all alike. Could the defendant discriminate on shipment of logs to Wilmington, for a consideration of a subsequent benefit to itself by obtaining a monopoly of shipment of lumber out of Wilmington, it could seriously damage the business and prosperity of that city. At that point are steamships and sailing lines and other railroads, and this competition making the town a distributing center is the source of its prosperity. If the terms upon which the defendant will haul logs into Wilmington are that it must haul the lumber out, then Wilmington ceases, as to that business, to be a competent point. The same discrimination could be made, if this were allowable, in freight on cotton or corn or rosin and other articles carried to Wilmington to be manufactured or put into other forms for use. Discriminating rates, as in this case, could be charged on the raw product, which would permit of the manufactured article, cloths, yarn, meal, whisky, turpentine, and the like, being shipped out only over the defendant's line. This is to place the prosperity of Wilmington, and also of the producers of raw material contiguous to that city along the lines of any of the defendant's road or branches, in the control of the defendant.

Hilton Lumber Co. v. Atlantic Coast Line R. Co

The point here presented has been often decided, and always—certainly at least in recent years—against the power claimed by the defendant. In *Baxendale v. Railroad*, 94 E. C. L. 308, after an elaborate argument, it was held by a very strong court as to this very point: "It is not a legitimate ground for giving a preference to one of the customers of a railroad company that he engages to employ other lines of the company for the carriage of traffic distinct from, and unconnected with, the goods in question; and it is undue and unreasonable to charge more or less for the same service, according as the customer of the railway thinks proper, or not, to bind himself to employ the company in other and totally distinct business." In *Menacho v. Ward* (C. C.) 27 Fed. 529, where the court was enlightened by the argument of Frederick Coudert and James C. Carter on opposing sides, it was held that "a common carrier cannot charge a higher rate against shippers who refuse to patronize it exclusively." President Hadley, in his *Railroad Transportation*, 108—a valuable work, by no means unfavorable to railroads—says: "A difference in rates, not based upon any corresponding difference in cost, constitutes a case of discrimination." In *Railroad v. Goodridge*, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. Ed. 986, it is said: "It is no proper business of a railroad company as a common carrier to foster particular enterprises or to build up new industries; but, deriving its franchises from the Legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons on an absolute equality." This would not be the case if a patron shipping logs to Wilmington must pay higher for that service than one who subsequently ships lumber.

Among the numerous cases condemning discrimination, and holding that freight paid in excess of that charged others for the same service can be recovered back, are *Hays v. Penn. Co.* (C. C.) 12 Fed. 309, and cases cited in notes thereto; *Handy v. Railroad*, supra—a spicy opinion by a justly indignant judge. It was held that charging from New Orleans to San Francisco a lower rate on goods shipped to New Orleans from London than upon the same goods shipped from New York to New Orleans was an unjust discrimination and illegal. *Interstate Commerce Commission v. Railroad* (C. C.) 52 Fed. 187. It is not the question of profit to the carrier, so the court holds, in attracting shipments which would not otherwise come to it, but the injustice of charging differing rates for the same service; and the court quotes with approval the English decisions (*Harris v. Railroad*, 3 C. B. [N. S.] 693; *Evershed v. Railroad*, 2 Q. B. Div. 254) that "preferences given to shippers to induce them not to divert traffic from the carrier, or to induce them to transfer traffic which otherwise would go to another carrier, are

Hilton Lumber Co. v. Atlantic Coast Line R. Co

unlawful, and cannot be justified upon the ground of profit to the carrier allowing them." To similar purport, *Wright v. U. S.*, 167 U. S. 512, 17 Sup. Ct. 822, 42 L. Ed. 258; *Packet Co. v. Railroad (C. C.)* 60 Fed. 545; *R. R. Co. v. Wilson*, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105, many others. Even when the discrimination is based on a larger quantity being shipped, it is illegal, when the smaller quantity, as in car-load lots, costs no more to handle in proportion to the quantity. *Kinsley v. Railroad (C. C.)* 37 Fed. 181, approving *Hays v. Penn. Co.*, supra.

The vice in the discrimination here shown is twofold: (1) It necessarily tends, if allowable, to build up defendant's railroad and break down competing carriers, which is forbidden by public policy. *Joint Traffic Case*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. (2) The condition upon which the right to the lower rate was given was secret, not written on the face of the schedule, which, as reported to the Railroad Commission and printed for public information, was \$250. A secret rebate is prohibited by statute and by all the decisions of the courts, yet this rebate of 40 cents not allowed to the plaintiff has amounted to \$3,900, in five months' time.

The testimony of railroad officials in the report to Congress of the Industrial Commission (volume 4, p. 273, and volume 9, p. 131) shows that the methods of discrimination resorted to are many, and that manufacturers especially can be made or destroyed at the will of railroad managers, unless there is the most absolute and exact equality to all in the same charge for the same service. Volume 9, pp. 287, 289, Report of Industrial Commission. *Interstate Commerce Comm. v. Railroad*, 128 U. S. 59, is one instance of an ingenious discrimination. The present case is another. Discrimination is protean in the divers forms it assumes. The argument in all countries in favor of governmental ownership of railroads is based upon the deadly effect of discrimination in rates under private ownership, and the difficulty in preventing it, rather than upon higher rates. The condition upon which private ownership of railroads can or will be maintained in England and this country (which alone retain it) is the strict and effective enforcement of equality in charge to all for the same service under the same conditions and at the same cost, as is required by the statutes both state and federal.

The defendant cannot justify under what is known as "milling in transit." Those are cases where freight is shipped a long distance, and the carrier will, at his own cost, defray the expense of its change in form en route, because of the easier handling in the more compact shape, as, for example, *Cowan v. Bond (C. C.)* 39 Fed. 54, where a railroad company receiving cotton in Louisiana for shipment to mills in New England had it compressed en route at Vicksburg at its own expense, charging the shipper no more than if it had

Chicago City Ry. Co. v. Lannon

carried the uncompressed cotton all the way; the same privilege being open to all shippers. That has no analogy to this case, where the plaintiff is shipping logs to its mill in Wilmington, and is charged nearly one-fifth more freight than others unless it will agree to ship its lumber out of Wilmington over the defendant's road. Among other cases in point are *Mayor, etc., of Wichita v. Railway Co.*, 9 Interst. Com. R. 569, at pages 572, 579, 580; the *Tap Lines Cases*, 10 Interst. Com. R. 193; *Packet Co. v. Railroad*, *supra*.

There are other errors assigned in the admission of evidence, in the charge, and in matters of practice; but, in view of the error in this matter of vital interest to the public at large, and especially to the business interests of the state, it will be unnecessary to consider them. The plaintiff had a right to have its logs carried to its mill at the same rate as others, without binding itself to ship its lumber by the defendant's line, or, indeed, to ship it at all.

But independent of any decisions, our statute, which nearly copies the English traffic act and the United States interstate commerce act in this and many other respects, is too explicit to be misconstrued. The corporation commission act (Laws 1899, p. 301, c. 164) provides (section 13) that if any common carrier shall charge or collect "from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands or collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Error.

CHICAGO CITY RY. CO. v. LANNON.

(Supreme Court of Illinois, Oct. 24, 1904.)

[72 N. E. Rep. 585.]

Injury to Passenger—Instructions.

In an action against a street car company for an injury to a passenger resulting from the car on which he was riding coming in contact with a vehicle which it was passing, evidence as to the right of way of street cars over vehicles was properly excluded.

Instructions.

Refusing an instruction the substance of which had already been given is proper.

Appeal—Review.

The Supreme Court will not review the conflicting evidence where there is evidence to support the judgment.

Appeal from Appellate Court, First District.

Action by Charles J. Lannon against the Chicago City

Chicago City Ry. Co. v. Lannon

Railway Company and another. Judgment for plaintiff was affirmed by the Appellate Court, and defendant railway company appeals. Affirmed.

This is an action on the case, brought by appellee, Charles J. Lannon, against the Chicago City Railway Company, appellant, and the Pabst Brewing Company, to recover for personal injuries sustained by him on June 4, 1901, while riding as a passenger on one of appellant's cars. On the morning in question, appellee, who was a bricklayer, boarded a car bound for the stockyards. He sat at the extreme left end of the last seat at the rear of the car, facing the front. The car was open, and the seats extended across it without any center passageway. As the car proceeded southwest on Archer avenue it came up behind and near to a heavily loaded beer wagon of the Pabst Brewing Company going in the same direction along the car tracks. The driver of the wagon attempted to turn out of the railway tracks to the left, and in a southerly direction, during which time the car kept moving at about three or four miles an hour. The wagon got far enough from the tracks for the front end of the car to pass it, though in close proximity. Just as the part of the car where the appellee sat was about to pass, the corner of the wagon box collided with the car, and the appellee's arm was crushed at the elbow between the wagon box and the side of the car. The suit was brought against both the Chicago City Railway Company and the Pabst Brewing Company, and the jury found the defendant brewing company not guilty, and the defendant the Chicago Railway Company guilty, and assessed plaintiff's damages at \$5,000. An appeal was prayed to the Appellate Court for the First District, where the judgment of the superior court was affirmed, and a further appeal has been prayed to this court.

William J. Hynes, James W. Duncan, and C. Le Roy Brown, for appellant.

Theodore G. Case and John T. Murray (A. W. Browne, of counsel), for appellee.

WILKIN, J. (after stating the facts). The defendant street car company requested the court to give an instruction to the jury to the effect that the street car had the right of way over other vehicles, and that the jury had the right to take that fact into consideration in determining whether or not its servants were negligent at the time of the accident; but the court refused to give it. It also offered in evidence, but the court refused to admit, an ordinance of the city of Chicago providing that street cars should have the right of way as against other vehicles, and making it unlawful for the driver of any wagon to obstruct a street car. Both of these rulings are urged as reversible error. The question at issue was not as to the right of way of the street car, or whether

or not the driver of the beer wagon was a trespasser liable to punishment for obstructing the car, but whether or not the servants of the appellant negligently, carelessly, wrongfully, and improperly operated the car at the time it came in contact with the wagon, and caused the injury to the plaintiff. Neither the offered evidence nor the refused instruction was pertinent to that issue. Conceding that appellant had the absolute right of way, and that the wagon was wrongfully on the track, those facts could in no way excuse its employees in failing to exercise the highest degree of care consistent with the operation of the car for the safety of passengers riding therein, and, if they were negligent in that regard, causing the accident, the company must be held liable; but not otherwise. The evidence was immaterial, and the instruction inapplicable to the case.

Complaint is also made of the refusal of the trial court to give the second instruction asked on behalf of the defendants. Of the 21 instructions asked by their counsel 18 were given, and they cover every substantial theory of the defense. The nineteenth and twentieth contained all that was material or proper to be given in the second, and there was, therefore, no error in the refusal to give it.

It is also assigned for error that the trial court refused to instruct the jury, at the close of all the evidence, to find the defendants not guilty; the contention being that the evidence wholly failed to prove negligence on the part of the servants of the street car company, as alleged in the declaration. Peter Gore, the driver of the beer wagon, testified: "I was driving southwesterly and the street was not paved on the right-hand side. The first thing I knew I was pulling out of the switch, and swung the horses south. I was not quite out, I don't hardly believe, but the hind wheel, I believe, was dragging on the switch, or something like that; and I got one little jar—a hard jar," etc. Meda Schlaizer, a passenger in the car, testified: "Before the wagon got all of the way out the car started to go with a kind of a jerk, so the Pabst wagon ran the whole length of that car along the little fender that was there. It struck the whole length of that, and Mr. Lannon was sitting resting his arm, and the wagon struck him on the left arm." This evidence fairly tended to prove that the motorman started his car forward before the wagon had cleared the track, thereby causing the collision and inflicting the injury complained of. Accepting it as true, as we must for the purpose of considering the question now before us, the servants of appellant in charge of the car did not exercise that degree of care for the safety of those being conveyed in it as passengers which the law requires, and we cannot, therefore, say that there is no evidence tending to support the verdict. It is true that there is much evidence in the record tending to prove that the wagon had entirely cleared the track when the speed of the car was increased, and that the

Ft. Wayne Traction Co. v. Hardendorf

hind wheels were swung back against the car by reason of a switch at that place; but it was for the jury, under proper instructions from the trial court, and the Appellate Court, to determine all controverted questions of fact. Our jurisdiction is limited to the single question, was there any evidence which, with all its reasonable inferences and intendments, fairly tended to prove the plaintiff's case? and, limiting our inquiry to that question of law, we cannot say that the trial court improperly refused to give the peremptory instruction.

There seems to be no reversible error in this record, and the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

FT. WAYNE TRACTION CO. v. HARDENDORF.

(Supreme Court of Indiana, Dec. 7, 1904.)

[72 N. E. Rep. 593.]

Special Verdict.

Under the express provisions of Burns' Ann. St. 1901, § 556, special findings control the verdict only when inconsistent therewith.

Injury to Passenger—Contributory Negligence—Standing on Running Board.*

A passenger on a crowded street car, who stands on the running board and supports himself by the guard bar, does not, as a matter of law, fail to exercise such ordinary care as the circumstances require, especially when the representative of the carrier, charged with the duty of seating and directing the passengers, expressly authorizes him to stand there.

Same—Question for Jury.

Where a passenger standing on the running board of a street car was injured by being struck by another car passing on another track, *held*, that the question whether defendant was negligent in running its cars so close together was one for the jury.

Appeal—Review.

It is not the province of the Supreme Court on appeal to review the facts and weigh the evidence.

Sufficiency of Evidence.

Where a passenger on a street car, while standing on the running board, was injured by being struck by another car passing on another track, in an action by him for the injuries, evidence considered, and *held* to sustain a verdict for plaintiff.

Passengers—Carriers' Rules—Instructions.

Where a passenger on a street car, while riding on the running board, was injured by being struck by another car passing on another track, in an action by him for the injuries an instruction that if plaintiff's injuries were due to his violation of the rules of the defendant, and if a guard rail was placed on the car, so that passengers were warned not to stand on the running board, and plaintiff ignored the presence of the guard rail, he could not recover, even though the conductor permitted him to stand on the running board, was properly refused, in that it omitted to inform the jury that notice of the existence of the rules must be shown before plaintiff could be bound by them.

*See foot-note appended to *Radley v. Columbia Southern Ry. Co.* (Ore.), 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153.

Ft. Wayne Traction Co. v. Hardendorf

Same—Standing on Running Board—Authority of Conductor.

In an action against a street railway company for injuries to a passenger, the question whether the conductor of the car had authority to permit a passenger to stand on the running board was for the jury.

Appeal from Circuit Court, Wells County; E. C. Vaughn, Judge.

Action by Theodore Hardendorf against the Ft. Wayne Traction Company. From a judgment in favor of plaintiff, defendant appealed. Transferred from the Appellate Court, under Act March 13, 1901 (Acts 1901, p. 590, c. 259; section 1337u, Burns' Ann. St. 1901). Affirmed.

Barrett & Morris, for appellant.

S. M. Hench, for appellee.

DOWLING, C. J. Hardendorf, who was the plaintiff below, sued the Ft. Wayne Traction Company for a personal injury alleged to have been sustained by him while a passenger on one of appellant's cars. The complaint was in two paragraphs, the negligence charged in the first being that the appellant wrongfully permitted the car on which the appellee was a passenger to run into and against another car before it had cleared a switch; and the second paragraph alleging that the appellant negligently ran two cars against each other, whereby appellee, who was a passenger on one of them, was injured. The answer denied all the averments of the complaint. The cause was tried by a jury, who returned a general verdict in favor of the appellee. Answers to numerous questions of fact submitted to the jury accompanied their verdict. Motions for judgments on the special answers and for a new trial were overruled, and judgment was entered upon the verdict. These rulings are assigned for error.

The following is a summary of the facts stated in the special answers: The plaintiff was injured while riding on one of defendant's open cars, May 30, 1900, going eastward from Linwood Cemetery to the city of Ft. Wayne, Ind. Before it started, the defendant caused a wooden guard bar, 3 inches wide and 1½ inches thick, extending past all the seats, elevated 2 feet above the floor, and securely fastened in its position, to be placed on the left side of the car, 3 feet above the running board on that side, which also extended the whole length of the car. The bar was so placed, as the plaintiff knew, to warn passengers not to enter or leave the car on its left side, and not to stand on the running board. When the car started from the cemetery toward Ft. Wayne, the plaintiff made no attempt to get on the car on its south side, but stood on the running board, against said bar, and remained in that place until the car passed into the south side of defendant's switch, west of the St. Mary's River Bridge. At that time another of defendant's passenger cars was on the north side of the switch to be moved westward, and the

plaintiff was then on the running board, between the two cars; and, at the point where they met or attempted to pass each other, the space between the tracks was too narrow to permit the plaintiff to stand safely on the running board. The plaintiff received the injuries complained of at the time the two cars passed each other on the switch, by being struck, while on the left running board, by the side of the car on the north track of the switch. The plaintiff was not acquainted with the lines and tracks of defendant's railway at the place of the accident.

Counsel for appellant argue that the special answers of the jury show contributory negligence on the part of the plaintiff, and that his injury was caused by his want of ordinary care, in occupying a place of obvious danger, in disregard of the warning and prohibition implied by the presence of the guard bar. They further contend that, even if the plaintiff was on the running board with the permission or by the direction of the conductor of the car, the appellant is not liable, because the conductor had not authority to permit or license a violation of the rules of the company, or a disregard of known precautions adopted by the appellant for the safety of passengers and for its own protection. They cite *Bass, Receiver, v. Reitdorf*, 25 Ind. App. 650, 58 N. E. 95; *Railway v. Goddard*, 25 Ind. 185; *Railway v. Duncan*, 28 Ind. 441, 92 Am. Dec. 322; *Nave v. Flack*, 90 Ind. 205, 46 Am. Rep. 205; *Baltimore R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506; *Louisville R. Co. v. Eves*, 1 Ind. App. 224, 27 N. E. 580; *Trout v. City of Elkhart*, 12 Ind. App. 343, 39 N. E. 1048; *Smith v. Wabash R. Co.*, 141 Ind. 92, 40 N. E. 270; *Aurelius v. Lake Erie & Western R. Co.*, 19 Ind. App. 584, 49 N. E. 857; *Neiboer v. Detroit Electric R. Co. (Mich.)* 87 N. W. 626. A general verdict is the response of the jury to the whole of the evidence in the cause. The particular facts found in answer to interrogatories in most cases constitute a part only of the facts proved on which the general verdict rests. The special finding shows that the facts stated, as the jury believed, were proved upon the trial, and that they probably were considered by the jury; but the general verdict, taken in connection with the special answers, indicates that because of other facts, and from presumptions or inferences from them, the particular facts found were not of controlling influence in determining the nature of the verdict. The special finding of facts controls the general verdict only when inconsistent with it. Section 556, *Burns' Ann. St.* 1901. And every reasonable presumption will be indulged in support of the general verdict. *Ridgeway v. Dearing*, 42 Ind. 157. There is no difficulty in this case, and the answers to the interrogatories are easily reconciled with the verdict. The position of the plaintiff on the running board may not have been necessarily dangerous or improper, or he may have taken it with the permission or by the direction of some agent of the company

Ft. Wayne Traction Co. v. Hardendorf

who was authorized to assign him a place on the car, or there may have been other circumstances which made it necessary or proper for him to stand there. Nothing in the answers to the interrogatories was inconsistent with the fact that, by reason of special precautions in the running of the cars on that occasion, their reduced rate of speed, and special instructions to motormen and conductors for their guidance when meeting or passing other cars, a place on the running board may have been rendered as safe and as suitable for a male passenger as a seat within the car. Hence, although the plaintiff may have known that the guard bar was put up to warn passengers not to enter or leave the car on its left side, and not to stand on the running board, yet the circumstances may have been such as to justify a person of ordinary prudence and care for his own safety in standing on the running board, and in following the directions of an agent of the company charged with the duty of placing the passengers, in taking a position there. *Citizens' St. R. Co. v. Jolly*, 161 Ind. 80, 67 N. E. 935. The special findings were not irreconcilable with the general verdict, and appellant's motion for judgment upon them was properly overruled.

The motion of a new trial rests upon two grounds: First, that the verdict was not sustained by sufficient evidence; and, second, error of the court in refusing to give instructions numbered 4 and 6. Upon the motion, counsel for appellant undertake to maintain two propositions: (1) That it appears from the evidence that appellee's injuries were not occasioned by appellant's negligence; and (2) that they were the result of his own contributory fault. Upon this branch of the case the facts proved were as follows: Before the car started from the cemetery, which was about $1\frac{1}{4}$ miles from the courthouse at Ft. Wayne, a substantial guard bar was securely fastened on the left side of the car, three feet above the running board, and extending the whole length of the car. The plaintiff knew that it was put up to warn passengers not to enter or leave the car on that side, and not to stand on the running board. May 30, 1900, was Decoration Day, and a great number of people—men, women, and children—had assembled at Linwood Cemetery to hear and to see the exercises. Shortly after 3 o'clock the plaintiff, with his son, a child seven years old, went to the appellant's car to take passage back to Ft. Wayne. The car was crowded, and the plaintiff stepped upon the running board on its left side. The agent of the company, one of whose duties it was to superintend the loading of the cars, to place and remove the guard bars, and to start the cars, came to the left side of the car, where the plaintiff was standing, and proceeded to put up the guard bar. The car was standing still, plaintiff's son was on the ground, and plaintiff was trying to get him up on the step. The agent pushed the bar along the side of the car and under plaintiff's arm. He said to plaintiff, "Put the

boy inside, and hang on this guard rail." The plaintiff did as he was told to do, and, afterward, while on the running board, paid his fare to the conductor of the car. No objection to his riding on the running board was made by any one. Other persons also stood upon the running board. While the car was passing out of a switch, and was near its point, it came into collision with another of defendant's cars moving in the opposite direction, which had started out of the other track too soon to clear the plaintiff's car; and the plaintiff was caught between the two, and was crushed and rolled along their sides until his body dropped out at the rear end of the car on which he stood. His injuries were of a very serious character, and their effect was permanent. It cannot be stated as a conclusion of law that a passenger on a crowded street car, who stands upon the running board and supports himself by the guard bar, does not exercise such ordinary care as the circumstances require. More especially may the passenger be justified in taking and maintaining such a position when the representative of the company who is charged with the duty of seating and directing the passengers expressly authorizes him to standing in that place. The facts that no objection is made by the conductor of the car who collects the fare of the passenger, and that other persons at the same time are suffered to stand upon the running board, may also be considered in determining the question whether the plaintiff exercised ordinary care under the circumstances. The nature of the construction of a street railroad, and the manner in which it is operated, may be such as to render the position of passengers on the running board apparently safe. The presence of a guard bar, when the persons in charge of the road and engaged in the management of the car direct the passenger to stand on the running board, outside of the bar, is not to be regarded as a positive and unmistakable indication that the running board is a place of danger, or that the persons in charge of the car have no authority to permit passengers to stand there while the car is in motion. The perils of such a position are neither so great nor so obvious in all cases as to bar a recovery when the passenger is injured while occupying it. There was no evidence that the knowledge of any rule of the company prohibiting passengers from standing on the running board was brought home to the plaintiff.

The questions whether the plaintiff exercised ordinary care, and whether the defendant was negligent in running its cars at the switch so close together that they could not clear each other, or pass without coming in collision, were questions of fact, and it was the especial duty of the jury to decide them. It is not the province of this court on appeal to review the facts and weigh the evidence, and the possibility that, upon such facts, another and different opinion might be arrived at, furnishes no reason why the practical conclusions

Ft. Wayne Traction Co. v. Hardendorf

of the jury should be set aside, and an opposite view of the effect of the evidence substituted for their verdict. *Cooley on Torts* (2d Ed.) 805; *Cincinnati, etc., Ry. Co. v. Grames*, 136 Ind. 39, 34 N. E. 714; *Board, etc., v. Bonebrake*, 146 Ind. 311, 45 N. E. 470; *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745; *Ohio, etc., Ry. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134; *Indiana Pipe Line v. Neusbaum*, 21 Ind. App. 361, 52 N. E. 471; *Louisville, etc., R. Co. v. Williams*, 20 Ind. App. 576, 51 N. E. 128; *Citizens' Street R. Co. v. Hoffbauer*, 23 Ind. App. 614, 56 N. E. 54. It is to be observed in the present case that there was no evidence of any rule of the appellant forbidding passengers to stand on the running board; that it was not proved as a fact that such a position was a dangerous one; it did appear that the car was crowded, and that other passengers were on the running board. These facts distinguish this case from several of those cited by counsel for appellant. We are also of the opinion that the guard bar did not necessarily import notice to the passengers that standing on the running board was not allowed, and that the agents of the company had not authority to permit it.

An examination of the authorities discloses wide differences of opinion among the courts upon the effect of evidence that the passenger, when injured, was upon the running board of a street car. The more reasonable view seems to us to be that the question is generally one of fact, depending upon the circumstances of the particular case. *Kentucky, etc., Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. 338; *Willis v. Long Island R. Co.*, 34 N. Y. 675; *Morris v. Eighth Ave. R. Co.*, 68 Hun. 39, 22 N. E. 666; *Lake Shore, etc., R. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510; *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125 (Gil. 110), 18 Am. St. Rep. 360; *Bruno v. Brooklyn City R. Co.*, 5 Misc. Rep. 327, 25 N. Y. Supp. 507; *Werle v. Long Island R. Co.*, 98 N. Y. 650; *Chicago, etc., R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406; *Woods v. Southern Pacific R. Co.*, 9 Utah, 146, 33 Pac. 628; *Cleveland, etc., R. Co. v. Manson*, 30 Ohio St. 451; *Louisville, etc., R. Co. v. Kelly*, 92 Ind. 371, 47 Am. Rep. 149. In 5 Am. & Eng. Ency. Law, 682, the general rule is stated to be that where the passenger acts under the direction of the conductor, or other servant of the carrier having apparent authority in that behalf, he is not guilty of contributory negligence, on the ground that the carrier's agent and servant is presumably familiar with the operation of the cars, and has reasonable knowledge of what is required for the safety and protection of passengers. As a qualification of the rule, it is also said that, even in the case stated, the question ordinarily is one for the jury, to be determined from all the circumstances. *Hannibal, etc., R. Co. v. Martin*, 111 Ill. 219; *Lent v. N. Y. Cent., etc., R. Co.*, 120 N. Y. 467, 24 N. E. 653; *Davis v. Louisville, etc., R. Co.*, 69 Miss. 136, 10 South 450.

Our conclusion on this branch of the case is that the verdict was sustained by sufficient evidence. In *Bass, Receiver, v. Reitdorf*, 25 Ind. App. 650, 58 N. E. 95, cited by counsel for appellant as much in point, printed notices in conspicuous places warned all persons using the swimming pool against passing beyond the ropes which marked the places of danger, and it was shown that the injured person was able to read them.

Instructions numbered 4 and 6 were to the effect that if appellee's injuries were due to his violation of the rules of the company, and that if a guard rail was placed on the car, so that passengers were warned not to stand on the running board, and appellee, with knowledge of that, ignored the presence of the guard rail, and by reason thereof was injured, he could not recover, even if the conductor permitted him to stand on the running board, because such consent would be beyond the authority of the conductor. The first of these instructions wholly omitted to inform the jury that notice of the existence of the rules must be shown before the plaintiff could be bound by them, and for this reason, if for no other, it was objectionable. The sixth declared, as a rule of law, that it was beyond the authority of the conductor to permit a passenger to stand on the running board. This was not a correct statement of the law. The power and authority of the conductor were such as were expressly conferred upon him by the company, such as were necessary to the discharge of his duties, and such as he was accustomed to exercise with the knowledge and approval, express or implied, of the corporation. Whether he had authority to permit passengers to stand on the running board was a fact to be determined by the jury. Besides, the substance of both these instructions, so far as they stated the law correctly, was given elsewhere in the charge of the court.

There is no error in the record. Judgment affirmed.

NORTHERN PACIFIC RAILWAY COMPANY, Appt., v. AMERICAN TRADING COMPANY.

(Argued October 26, 27, 1904. Decided December 5, 1904.)

[25 Sup. Ct. Rep. 84.]

Contract to Forward by Designated Vessel of Connecting Carrier.

A special agreement by a carrier to transport a through shipment by the vessel of a connecting carrier sailing on a designated date results from the acceptance of a through rate for a shipment "to be forwarded" via such steamer, which rate was quoted with notice that it was of vital importance that the shipment should be transported promptly, and should go forward by the earliest possible steamer without delay, in order to enable the shipper to fulfil a proposed agreement which it was about to make for the sale of the goods at the final destination, and which would require delivery there at a fixed date.

Northern Pac. Ry. Co. v. American Trading Co

Same—General Agent of Railway Receivers—Whether Acting for Receivers or Steamship Company.

The general agent of the receivers of a railway company is acting as agent for such receivers, and not as the agent of a connecting steamship company, in agreeing to forward a through shipment by a steamer sailing on a specified day, where his only authority as agent of the steamship company was created by a contract between the railway and steamship companies, under which the railway company was to appoint agents, who should act for the steamship company to quote through rates and issue through bills of lading, and the application for a rate for such shipment was made to him as agent for the receivers, and the rate was quoted by him as such agent, and as such he signed a letter confirming the rate, and so described himself when informing the steamship company's agents at the connecting point that he had made a contract guaranteeing delivery by the designated steamer.

Same—Authority of Railway Receivers.

The making of a special agreement to forward a through shipment by the steamer of a connecting carrier sailing on a designated day is within the authority of the receivers appointed, in a suit to foreclose a railway mortgage, to continue to carry on the railway business.

Same—Authority of Receivers' General Agent.

The "general eastern agent" of the receivers of the Northern Pacific Railroad Company, who were ordered to continue its business, has the general powers of such an officer when acting for the railroad company itself, which includes the authority to make a special agreement to forward a through shipment by the steamer of a connecting carrier sailing on a designated day.

Same—Limiting Liability to Own Line—Acceptance of Bill of Lading without Objection.*

A special agreement in behalf of railway receivers to forward a through shipment by the steamer of a connecting carrier sailing on a designated day is not modified by the mere receipt, without objection, and the subsequent hypothecation, of the bill of lading containing, as a part of numerous conditions printed in small type, the statements that the carrier is not to be liable for any loss not occurring on its own road, and that the contract as executed is accomplished, and all liability thereunder terminates, upon the delivery of the property to the vessel, where the bill was not examined or read, and was accepted after the goods had passed from the control of the shipper, by a clerk who had no knowledge of these conditions, and no authority to consent to a modification of the contract already made.

Same—Excuse for Nonperformance—Contraband of War—Refusal to Grant Clearance.

Nonperformance of a special agreement of a carrier to forward a through shipment by the steamer of a connecting carrier sailing on a designated day is not excused by the refusal of the deputy collector of the port to grant a clearance while the freight was on board because it was contraband of war, where the contract was not unlawful when made, and was not rendered unlawful by any subsequent legislation, and was made with knowledge that difficulties might arise in the course of transportation because of the character of the freight.

Same—Same—Same—Same—"Restraint" of Civil Authorities.

The mistaken refusal of the deputy collector of a port to grant a clearance while certain freight was on board because it was contraband of war does not constitute a "restraint of princes, rulers, or people," within the meaning of a clause in the bill of lading, so as to excuse

*As to whether the shipper's acceptance of a contract of shipment includes his assent to its printed conditions, see foot-notes appended to *Powers Mercantile Co. v. Wells-Fargo & Co. (Minn.)*, 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504, where all the preceding authorities in this series are collected.

nonperformance of the agreement to forward the shipment by that vessel.

Appeal from the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed a decree of the United States Circuit Court for the Southern District of New York dismissing a petition in intervention in a suit to foreclose a railway mortgage, which seeks to require the receivers to pay damages for their failure to perform a special contract for the transportation of goods. Affirmed.

See same case below, 57 C. C. A. 533, 120 Fed. 873.

Statement by MR. JUSTICE PECKHAM:

The Northern Pacific Railroad Company made a certain mortgage which was foreclosed, and the Northern Pacific Railway Company purchased the property of the former company under the mortgage at the foreclosure sale, and, by the order of the court, the purchaser was required to pay all obligations or liabilities contracted or incurred by the court's receivers, who had been appointed in the foreclosure suit. The American Trading Company, the appellee herein, intervened in that suit, and, by its petition, asked that, by virtue of the decree in foreclosure, the purchaser, the Northern Pacific Railway Company, be required to pay damages for the failure of the receivers to perform a special contract for the transportation of goods from Newark, New Jersey, to Yokohama, in Japan. The case was tried before the United States circuit court, in New York city, which dismissed the petition. This decision was reversed by the circuit court of appeals for the second circuit, and the railroad company was directed to pay the damages therein stated to the American Trading Company, the intervening petitioner. The railroad company has appealed from such decree or order to this court. The case was tried upon the agreed statement of facts which follows:

1. In September, 1894, Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse were receivers of the Northern Pacific Railroad Company, under an order made in a suit bearing the same title as the present suit, in the United States circuit court for the eastern district of Wisconsin, to which this suit is ancillary. Under that order the receivers were authorized to continue, and were continuing, to carry on the business of the railroad in their charge.

2. The line of railroad in the possession of the receivers extended from Duluth, Minnesota, to Tacoma, Washington. The receivers had contracts with various carriers reaching points on their line, by which through bills of lading were issued from and to points not upon the line of the receivers' railroad, where the freight passed over some part of that line in transit. Among the carriers with whom the receivers had such arrangements was the Northern Pacific Steamship Company.

Northern Pac. Ry. Co. v. American Trading Co

This was an English company, operating a line of steamers between Tacoma and points in Japan and China, including Yokohama. The contract between the steamship company and the receivers was the contract originally made on March 30, 1892, between the Northern Pacific Railroad Company and the Northern Pacific Steamship Company, and ratified and adopted by the receivers, under the authority of an order of the circuit court of the United States, made on September 13, 1893.

The receivers held no stock in the steamship company, and had no other express contract relation with the steamship company. This stipulation is not to be accepted as an admission by the railroad company, or the receivers, or their counsel, that there were any relations between the receivers and the steamship company other than those growing out of the facts herein agreed upon.

For convenience in transacting their freight business in the eastern part of the United States, the receivers maintained an office in the city of New York, which was, in September, 1894, in charge of one George R. Fitch, who was their general eastern agent, and made arrangements for the transportation of freight over the receivers' line of railway and connections, including transportation to China and Japan.

At the time of the transactions referred to in this statement of facts, the said Fitch had not received, nor did he receive, any direct or independent appointment or authority from the Northern Pacific Steamship Company, to act as agent of that company. His only authority as agent of the steamship company was that created by, or arising from, the contract, exhibit A. Fitch knew that an arrangement had been concluded by the receivers and the steamship company, by which contracts for through shipment to Yokohama might be made by the agents of the receivers, and through bills of lading issued, and he had been instructed by the receivers to solicit freight for through transportation upon bills of lading, of which exhibit C, hereto annexed, is a copy; but Fitch did not know the terms of the contract between the steamship company and the receivers, and the trading company did not know what company operated the steamships between Tacoma and Yokohama, or that the steamship company was a separate and independent company or that there was any contract between the receivers and the steamship company.

It is further stipulated that Fitch had no express general authority to make contracts for through transportation, except as provided by the said bills of lading, and no authority to make the contract in question, unless such express authority be found in the telegrams, of which copies are hereinafter set forth; that the American Trading Company did not know the terms of his express authority, and that this stipulation is not to be taken as an admission by the railroad company,

Northern Pac. Ry. Co. v. American Trading Co

or the receivers, or their counsel, that his implied authority was greater than his express authority.

4. The American Trading Company is, and was in September, 1894, a corporation organized under the laws of the state of Connecticut, having its principal office in the city of New York, and carried on a general commercial business with Asiatic ports.

5. In September, 1894, the trading company applied to Fitch for a rate upon a proposed shipment of pig lead from New York to Yokohama, Japan, and informed him that it was of vital importance that the lead should be transported promptly, and go forward by the earliest possible steamer, without delay, in order to enable the trading company to fulfil a proposed agreement, which it was about to make for the sale of the lead in Japan, and which would require its delivery there at a fixed date. Fitch thereupon named a rate, and undertook to forward the lead from New York on or before September 29th, and via the Northern Pacific steamer Tacoma, sailing from Tacoma October 30, 1894.

6. Thereupon the trading company cabled to its agents at Yokohama, naming a price, and a date at which the lead could be delivered there; and thereupon its agents in Yokohama made a contract for the sale of the lead, which contract provided that it should be delivered in Yokohama by overland route, and the most direct connection at San Francisco, Tacoma, or Vancouver, and that, in case of unusual or extraordinary delay in transit, the contract should be null and void. Neither Fitch nor the receivers knew, until September 24th, that any contract for the sale of lead in Japan had been concluded by the trading company, and, except as hereinbefore and hereinafter stated, they never received any information in regard to its terms, as made or proposed. Upon the conclusion of its Japanese contract, the trading company purchased 200 tons of pig lead in bond, from the Balbeck Smelting & Refining Company.

7. On September 19, 1894, Fitch, in confirmation of his previous statement, wrote and sent to the trading company the following letter:

Northern Pacific Railroad Company.

Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, Receivers.

Geo. R. Fitch, General Eastern Agent, 319 Broadway.

Traffic Department.

New York City, Sept. 19, 1894.

American Trading Co. 182 Front St., City.

Gentlemen:—

I hereby confirm rate quoted you this day, and accepted by you on shipment of pig lead for export to Japan, as follows:

Pig lead, New York to Yokohama, Japan, \$15.00 per ton of 2000 lbs., shipment not to consist of less than 400,000 lbs.,

Northern Pac. Ry. Co. v. American Trading Co

and to be forwarded from New York on or before Sept. 29th, in accordance with shipping instruction given you by me, and to be forwarded from Tacoma, Wash. via Northern Pacific steamer sailing from thence October 30th. Kindly forward your acceptance of the above as early as possible. Thanking you for the favor, I remain,

Yours truly,

Geo. R. Fitch,
G. E. Agent.

The trading company wrote and sent in reply (accepting the proposition) the following letter:

Sept. 20th, 1894.

The Northern Pacific R. R. Co., New York City.

Dear Sirs:—

In reply to your esteemed favor, Sept. 19th, we beg to accept the rate quoted to us in your letter of Sept. 19th, namely, on 200 tons of pig lead, N. Y. to Yokohama, Japan, \$15.00 per ton of 2,000 lbs., shipment not to consist of less than 400,000 lbs., to be forwarded from N. Y. on or before September 29th, in accordance with shipping instructions to be given by you, and to be forwarded from Tacoma, Washington, via Northern Pacific steamer sailing from that port Oct. 30th. Kindly let us know as soon as possible the shipping instructions, so that we can forward them to our supplier, and oblige, with best respects,

Very truly yours,

The American Trading Co.

(Signed)

Frank P. Ball.

On September 22, 1894, Fitch wrote and sent to the trading company the following letter, giving shipping instructions:

Northern Pacific Railroad Company.

Thomas F. Oakes, Henry C. Payne, Henry C. Rouse,
Receivers.

Geo. R. Fitch, General Eastern Agent, 319 Broadway.

Traffic Department.

New York City, Sept. 22, 1894.

American Trading Co., No. 182 Front St., City.

Dear Sir:—

I hereby confirm routing given you over the telephone yesterday on your shipment of pig lead for export to Yokohama, Japan, as follows: To be shipped from Newark, N. J., via Penn. R. R., marked Anchor Line rail and Lake, care Northern Pacific, care A. O. Canfield, agent N. P. R. R., Tacoma, Wash. Please advise me, as soon as possible, who the shippers will be, that I may order the cars, and also see that same are rushed through without delay to connect with our steamer at Tacoma.

Yours truly,

Geo. R. Fitch, G. E. Agent.

A. H. P.

8. Before naming a rate for the transportation of the lead,

Northern Pac. Ry. Co. v. American Trading Co

Fitch had expressed some doubt as to whether it might not be excluded from transportation as contraband, in view of the war then existing between China and Japan. In fact the shipment of pig lead was not prohibited by the Treasury Department at Washington during the war between China and Japan, and on September 25th, 1894, the trading company made another shipment of pig lead via Pacific Mail steamer sailing from San Francisco, which was, without trouble or delay, transported and delivered in Yokohama.

9. In September, 1894, J. B. Baird was the second assistant general freight agent of the receivers and J. M. Hannaford was the general freight agent of the receivers; and telegrams of which the following are copies, relating to proposed shipments of pig lead, including the shipment in question, passed between the said Fitch and Baird and Hannaford, but were not disclosed to the American Trading Company:

New York, September 14, 1894.

J. B. Baird, second A. G. F. A.:—

;; Please wire quick lowest rate one hundred ton lots pig lead from Chicago and Duluth to Yokohama.

George R. Fitch.

September 14, 1894.

Geo. R. Fitch, 319 Broadway, New York, N. Y.:—

You may quote as low as sixty cents from Duluth and seventy cents from Chicago to Yokohama on pig lead in one hundred ton lots. Get more if possible.

J. B. Baird.

New York, September 17, 1894.

J. B. Baird, 2d A. G. F. A.:—

;; Your wire fourteenth. Shall I accept fifty cents on pig lead Duluth to Yokohama? Also name lowest rate on two hundred tons St. Louis to Yokohama.

Geo. R. Fitch.

September 18th, 1894.

Geo. R. Fitch, 319 Broadway, New York:—

Cannot accept less than sixty cents on pig lead Duluth to Yokohama. Will quote from St. Louis later.

0.900.

J. B. Baird. WDB.

September 19, 1894.

G. R. Fitch, 319 Broadway, New York:—

You may quote seventy cents on the pig lead in one hundred ton lots St. Louis to Yokohama. Advise if accepted.

0.900.

J. B. Baird. WDB.

New York, September 22, 1894.

J. B. Baird, N. P. R'y, St. Paul, Minn.:—

Wire best rate two hundred fifty tons pig lead Duluth to Shanghai.

Geo. R. Fitch.

September 22, 1894.

G. R. Fitch, 319 Broadway, New York:—

N. P. Steamship Co. have now declined to handle lead for

Northern Pac. Ry. Co. v. American Trading Co

Yokohama, Kobe, Hong Kong, or Shanghai. Please cancel your quotation.

o.900.

J. B. Baird. WDB.

On September 24, 1894, Fitch informed the trading company that he declined to ship the lead upon the ground that it might be contraband of war, and thereupon on the same day, the trading company wrote him a letter stating that they would hold his company responsible for any loss from failure to fulfil the contract, which letter is as follows:

September 24th, 1894.

Geo. R. Fitch, Esq., General Eastern Agent N. P. R. R.,
No. 319 Broadway, City.

Dear Sir:—

Respecting your notice just received by us through your Mr. Post, that your company now decline to ship for us, via Tacoma, the 200 tons of pig lead specified in your contract with us, under date Sept. 19th, and confirmed by us under date Sept. 20th, we beg to advise that we shall hold your company responsible for any loss or damage we may suffer from the nonfulfilment of this contract with you.

We remain, dear sirs,

Very truly yours,

The American Trading Co.

(Signed)

Wm. H. Stevens, Treas.

Thereupon, telegrams, of which the following are copies, were sent and received as indicated, in relation to the shipment in question, but were not disclosed to the trading company:

New York, Sept. 24, 1894.

J. B. Baird, N. P. R'y, St. Paul, Minn.:—

Shipment, lead to Yokohama, is now being made; shippers refuse to accept withdrawal; we have given shippers written contract.

Geo. R. Fitch.

New York, Sept. 24, 1894.

J. M. Hannaford, N. P. R'y, St. Paul, Minn.:—

Have notified American Trading Co. that shipment will be refused. They state they will hold us to contract. They are shipping hundred tons from Denver to Yokohama by steamer City of Rio from San Francisco, Oct. fourth, and expect to forward this shipment same way; will charge us difference in rate. Advise quick.

Geo. R. Fitch.

Sept. 25, 1894.

G. R. Fitch, 319 Broadway, New York:—

Your wire this date to Mr. Hannaford: Dodwell, Carlill, & Co. have consented to accept the lead already contracted. Do not contract for any more. Advise quick number of pounds contracted by you and say how it will be routed. Think we should receipt for lead subject to delay.

o/900.

J. B. Baird. WDB.

Northern Pac. Ry. Co. v. American Trading Co

Dodwell, Carlill, & Co., mentioned in the last telegram, represented the steamship company.

10. Thereupon the refusal to accept the shipment was withdrawn, and the shipment was made under the contract, and the lead, consisting of 200 tons, was, in accordance with the shipping instructions given in Fitch's letter of September 22, 1894, shipped at Newark, New Jersey, in September 27th, 1894, by the Balbeck Smelting & Refining Company for the account of the American Trading Company. This was the first shipment ever made by the American Trading Company over the line of the Northern Pacific Railroad Company and its connecting carriers. The shipment was made in bond, for exportation at Tacoma, and was secured upon the cars by government locks and customs seals. On the afternoon of September 27, 1894, the shipment left Newark, and started on its journey, and was transferred via the Anchor Line, a carrier operating between eastern points and points on the Lakes, to Duluth, and carried from Duluth via the receivers' railroad to Tacoma, which it reached in time for shipment by the steamship company's steamer, Tacoma, sailing October 30, 1894. On September 28th, a check for the freight upon the lead from Newark to Yokohama was handed by the trading company to Fitch, of which check, with its indorsements, the following is a copy:

Check.

New York, Sept. 28", 1894. No. 6096.

The National Bank of North America.

Pay to the order of the Northern Pacific R. R. \$3,360.05.

Thirty-three hundred and sixty & 05/100 dollars.

The American Trading Co.

Wm. H. Stevens, Treas'r.

A. Proctor, Jr.,
Cashier.

Indorsements.

For deposit in
Ninth National Bank
to Cr. of Geo. R. Fitch,
Gen. East'n Ag't.

Ninth Nat'l Bank,
Indorsement,
guaranteed
of the City of N. Y.

The amount of the check was credited at the Ninth National Bank to the account of "George R. Fitch, General Eastern Agent," which was the style of the account opened by Fitch as agent of the Northern Pacific Railroad; and the account was never drawn upon in favor of the Northern Steamship Company; but all through freights received were deposited to the credit of this account and remitted to the railroad company, or its receivers, and were divided and distributed by them under their contract with the steamship company.

Northern Pac. R. Co. v. American Trading Co

11. On September 28, 1894, a shipping receipt for the shipment was issued to the Balbeck Smelting & Refining Company, of which shipping receipt a copy is hereto annexed marked exhibit "B," and was delivered by the Balbeck Smelting & Refining Company to the American Trading Company, and was forthwith surrendered by the trading company to Fitch.

A bill of lading in the usual printed form, a copy of which is herein annexed marked "C," was subsequently issued by Fitch to the American Trading Company. It was received by the clerk of the trading company without stated objection to its terms, but was not read or examined by him, or by any officer of the company, and was immediately hypothecated with the Hong Kong and Shanghai bank, as collateral security for moneys borrowed thereon by the trading company. The original of the bill of lading was negotiable and did not have stamped upon it the words "Not negotiable; shipper's copy," which appear on the shipper's copy hereto annexed, but was similar to the shipper's copy in all other respects.

On September 29th, 1894, Fitch sent a copy of this bill of lading to Dodwell, Carlill, & Co., with a letter (not disclosed to the American Trading Company) of which the following is a copy:

Northern Pacific Railroad Company.

Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, Receivers.

George R. Fitch, General Eastern Agent, 319 Broadway.
Traffic Department.

New York City, Sept. 29, 1894.

Dodwell, Carlill, & Co., Tacoma, Wash.

Gentlemen:—

I hand you herewith my B/L 1507 covering shipment of pig lead for export to Amer. Trading Co. Yokohama, Japan. As I have previously advised you, I have made contract guaranteeing delivery of this supplement at Yokohama by our S. S. Tacoma sailing Oct. 30th. Will you kindly see that this connection is made without fail.

Yours truly,

(S'g'd)

Geo. R. Fitch, G. E. A.

The previous letter of advice, referred to by Fitch in the foregoing letter, is lost, and no copy of it exists. It appears, however, from the following letter of acknowledgment to have borne date on September 27th:

Tacoma, Wn., October 2nd, 1894.

George R. Fitch, Esq., G. E. A., N. P. R. R., 319 Broadway, New York.

Dear Sir:—

We beg to own receipt of and thank you for your favor of the 27th ultimo, and advising the engagement of 40 tons of condensed milk and 225 tons of pig lead for our steamer Tacoma, sailing hence the 30th instant. Please keep us fre-

Northern Pac. R. Co. v. American Trading Co

quently advised of freight engagements, as we have applications now for more space for flour than our steamers will carry, and we are shutting out considerable of the latter every voyage.

Yours truly,

(Sig.)

p. p. Dodwell, Carlill, & Co.
A. T. Pritchard.

12. At Tacoma the lead was delivered by the receivers to the Northern Pacific Steamship Company, and was loaded upon the Tacoma, the vessel of the steamship company which was to sail on October 30th; but about 4 o'clock in the afternoon of that day the deputy collector of the United States at that port refused to clear the vessel while the lead was on board, upon the ground that it was contraband of war, and telegraphed to the collector at Port Townsend for instructions. On the following day, which was the 31st of October, the deputy collector at Tacoma received a telegram from the collector of the United States at Port Townsend, which was as follows:

"Department advises that, unless you have evidence tending to show that the pig lead at Tacoma, and referred to in your telegram of yesterday, is to be used in the war between China and Japan, no reason is perceived why shipment should not be permitted."

In the meantime, however, the master of the vessel unloaded the lead, which delayed the ship until 9 A. M. on the morning of October 31st, when he sailed without it.

The petitioner was not notified of the delay in the transshipment of the lead until November 5th, 1894.

The next vessel on the line was the Sikh, which did not belong to the steamship company, but was a chartered ship. Her captain declined to take the lead on the ground that it was contraband. The Northern Pacific Steamship Company cabled to the owners of the vessel in London, and they adhered to the position taken by the captain.

13. The lead went forward on the next vessel, the Victoria, on December 11, 1894, and did not arrive in Yokohama until on or about January 4, 1895, instead of on or about November 18, 1894, when it would have arrived had it gone forward on the 30th of October, 1894.

14. In the meantime hostilities between China and Japan had ceased, the price of lead had fallen very considerably, and the purchaser of the shipment refused to accept it, and declared the contract null and void in consequence of the failure to deliver it promptly in accordance with the terms of the contract.

15. The price of the lead under the contract would have been \$38,610.17. The lead was delivered to the trading company in Yokohama upon the surrender of the bill of lading, and, in consequence of the failure of its vendee to accept the lead, the trading company sold it for \$11,331.60, which was the best

Northern Pac. R. Co. v. American Trading Co

price obtainable therefor at the time of the sale. The sale was made as soon as a purchaser could be found. The value of the lead on January 4, 1895, in Japan, was \$11,906.16.

16. Upon the case arising on the foregoing facts, the American Trading Company has duly presented to the receivers, and to the Northern Pacific Railway Company, its claim, amounting to the sum of \$26,704.02, with interest thereon from the 4th day of January, 1895, and has demanded payment thereof; but payment has been refused, and no part thereof has been paid.

Mr. C. W. Bunn for appellant.

Messrs. F. B. Jennings and Howard Van Sinderen for appellee.

MR. JUSTICE PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court:

The objections to the recovery, herein made on the argument, were—

(1) That no contract was shown, on the part of the receivers, to assume any responsibility for the transportation of the lead beyond the line of the railway in their charge.

(2) That there was no proof that the court had authorized the receivers to assume any such responsibility, and they could not do so without any such authority.

(3) That if Fitch, the agent, made such agreement, it was not within his authority, real or apparent.

(4) That the bill of lading is the controlling contract, and by its terms the receivers were not liable beyond their own line.

(5) That the damages were caused solely by the act of the collector, representing the authority of the United States; and the receivers are not liable for damages so caused.

In regard to the first objection, we think the fact agreed upon clearly show a special agreement for the transportation of the lead to Yokohama by the steamship of the Northern Pacific Steamship Company, which was to leave Tacoma on the 30th of October, 1894. The opening of the negotiation was made by the American Trading Company, which applied to Fitch for a rate upon the proposed shipment from New York to Yokohama, Japan. The trading company knew nothing of his steamship agency, and he was informed that it was of vital importance that the lead should be transported promptly, and go forward by the earliest possible steamer without delay, in order to enable the trading company to fulfil a proposed agreement which it was about to make for the sale of the lead in Japan, and which would require its delivery there at a fixed date. Fitch thereupon named a rate, and undertook to forward the lead from New York to Yokohama, on or before September 29th, via the Northern Pacific steamer sailing from Tacoma October 30, 1894. The trading company thereupon made its proposed agreement

Northern Pac. R. Co. v. American Trading Co

through its agents at Yokohama. Although Fitch, the agent, was not thereafter specially informed of the fact that the proposed agreement had been made, yet he was informed that the company intended to make it if a rate could be agreed upon for the transportation of the lead. It is clear that his furnishing of the rate was with reference to the proposed agreement, and that he understood that, if his terms were accepted, he was entering into an agreement to transport to Japan the lead in question over the Northern Pacific railroad to Tacoma, and by the steamship which would leave Tacoma on the 30th of October, 1894. His letter of September 19, 1894, to the trading company, confirming the rate, is a plain agreement, not alone to deliver the lead in time for the sailing of the steamer, October 30, but an agreement that the lead should be forwarded from Tacoma, Washington, via the Northern Pacific steamer sailing on that day. Fitch in that letter asking the trading company to forward their acceptance of this proposed agreement as early as possible. On the next day, September 20, the trading company, by letter, did accept the rate "for a shipment of pig lead, to consist of not less than 400,000 pounds, to be forwarded from New York to Tacoma, and from Tacoma via the Northern Pacific steamer sailing from that port October 30." There is no doubtful expression in these letters. They form a clear and specific contract. It is entirely different from *Myrick v. Michigan C. R. Co.*, 107 U. S. 102, 27 L. Ed. 325, 1 Sup. Ct. Rep. 425. The receipt in that case was plainly not one which established a contract for transportation on the part of the railroad company (defendant) beyond its own line. This court held that while a company might, by a contract to that effect, be held liable for the transportation and delivery of freight beyond its own line, yet the contract to do so must be clear; and that the mere stating of a through fare on the receipt of the freight does not establish such contract or liability.

In the case at bar we hold that a special agreement is set forth in the statement of facts, to forward to Yokohama by the steamer leaving Tacoma on October 30, 1894. If it had been made by the proper officer of a railroad company in the general course of business we have no doubt, under the authorities, of the validity of the contract. *Ogdensburg & L. & C. R. Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693; *Myrick v. Michigan C. R. Co.*, 107 U. S. 102, 27 L. Ed. 325, 1 Sup. Ct. Rep. 425. Whether the fact that it was made by an agent of the receivers of a railroad company makes any difference will be discussed later.

Appellant urges, however, that, as Fitch was also agent for the steamship company, his contract, if there was one, to forward by the steamship sailing October 30, was in behalf of the steamship company. Fitch had never received any di-

Northern Pac. R. Co. v. American Trading Co

rect or independent appointment or authority from the Northern Pacific Steamship Company to act as its agent. His only authority as agent of that company was created by the contract made between the two companies. By that agreement the railroad company was to have the exclusive right (with certain exceptions) to appoint agents in the United States, etc.; and the steamship company thereby authorized the railroad company and its appointed agents to act as agents for the steamship company, and to issue bills of lading and passenger tickets, and to make and name rates on all traffic for Asiatic points, etc. The trading company did not know what company operated the steamships between Tacoma and Yokohama, or that the steamship company was a separate and independent company, or that there was any contract between the receivers and the steamship company. When the trading company, therefore, applied to Fitch for a rate, they applied to him as the agent of the receivers of the railroad company. The letter of Fitch of the 19th of September, confirming the rate already given orally that day, is written on the paper used by the receivers of the railroad company, which paper is headed by the names of the receivers under the words "Northern Pacific Railroad Co.;" and in it Fitch describes himself as "general eastern agent," and his department as the "Traffic Department in New York city," and he signs his name, and adds the words "G. E. Agent." In his letter of September 29, 1894, to the steamship agent at Tacoma, Washington, he writes on the same kind of paper, with the same heading, and describes himself as "general eastern agent;" and in the letter he says: "As I have previously advised you, I have made contract guaranteeing delivery of this shipment at Yokohama by our S. S. Tacoma, sailing October 30. Will you kindly see that this connection is made, without fail." He signs his name, and adds the letters G. E. A., meaning, of course, thereby "general eastern agent." It is contended that, by the statement of facts, it appears that Fitch was acting for two principals, and that the plaintiff must establish that Fitch made the alleged guaranty on behalf of the receivers. We do not think he was acting in behalf of two principals. From all the facts, we think it plain that he was acting for the receivers of the railroad company. He was their general eastern agent; he was applied to, and he made his rates, as such, and as such he signed the letter confirming those rates, and containing the agreement to forward the lead on the steamship as already stated. Subsequently, and on the 29th of September, while acting and signing himself as the general eastern agent of the receivers, he writes to the steamship agents at Tacoma the letter in which he says he has guaranteed delivery at Yokohama, by "our steamer" sailing October 30. All this shows the fact that he was acting as agent for the receivers.

We have no difficulty in determining the capacity in which Fitch acted, nor that he made the special agreement, as contended by the trading company.

(2) Neither do we doubt that the court had authorized the receivers to make such a contract.

Under the modern methods of foreclosing railroad mortgages, it has been the custom to appoint receivers to take charge and conduct the business of the railroad mortgagor during the pendency of the suit. The possession of such receivers frequently last for years. It would be in the highest degree disadvantageous to all interested in the railroad company, as well as to the public having occasion to do business with it, if the same power which the company possessed to make special contracts for transportation should not be given to and exercised by the receivers of the company in continuing to run the road in substance as a going concern, so far as these kinds of contracts are concerned. Such contracts are not of the character spoken of by Mr. Justice Jackson in *Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554, 38 L. Ed. 819, 14 Sup. Ct. Rep. 915, as so extraordinary or unusual as not to be included in the authority to carry on the business of the company. On the contrary, this contract is one of that class which we regard as so included.

(3) We are also of opinion that Fitch had the right to make the agreement in question, and, if there could be any doubt on that point, nevertheless the agreement was in fact thereafter ratified by the officers representing the receivers, who had power so to do. *Goodrich v. Thompson*, 44 N. Y. 324.

A railroad company has the power, as we have seen, to make such a contract of carriage beyond its lines. A general agent would be presumed to have such power. If the company have the power, some individual must exercise it. It would not be supposed that the board of directors would be consulted, and authority given by it every time such a contract was to be made. Who is a more proper or fit person to make the contract than the general agent of the company? He must necessarily have large powers in order to conduct the business of his office, and, *prima facie*, such power is within the scope of such agency. When the railroad company passes into the hands of a receiver, appointed by the court in a foreclosure suit, and the receiver is directed to conduct and continue the business of the company, the power to appoint general agents necessarily goes with the order to conduct the business of the company; and when the general agent is appointed by a receiver, he will be presumed to have the general powers of such an officer when acting for the railroad itself. The words "general eastern agent" for a Western railroad company only limit the exercise of the agency to the place so described.

(4) It is urged that the bill of lading constitutes the sole

contract. But there was a plain, valid contract existing between the parties before the lead was shipped, and before any bill of lading was issued. That special contract was to forward the lead by the steamship leaving Tacoma on the 30th of October. The next day after the lead was shipped at Newark, a bill of lading was delivered to one of the clerks of the trading company, and that bill of lading contains the absolutely inconsistent statement that the carrier is not to be liable for any loss not occurring on its own road, and that the contract, as executed, is accomplished, and all liability thereunder terminates, upon the delivery of the property to the steamship.

It is said that the trading company, by receiving this bill of lading and obtaining money on it as the representative of the property therein described, has acquiesced in the total abolition of the special contract the company made with Fitch, and has agreed that the railroad company shall be under no liability after the delivery of the lead to the steamship.

We regard it as entirely clear that no such effacement of the original contract was meant by the receipt of the bill of lading. The railroad company had no power alone to alter that contract, and it could not alter it by simply issuing a bill of lading, unless the other party assented to its conditions, and thereby made a new and different contract.

At the time when the bill of lading was issued the lead had been shipped at Newark, and had departed for its destination. It was impossible for the trading company to recall it. The particular conditions in the bill are set out in subdivision 3 and subdivision 12 of the conditions printed in small type, and they form part of numerous other printed conditions in regard to the freight received.

Where the acceptance of the bill of lading, under these circumstances, is sought to be made an equivalent to an assent to the change of contract, it is proper to look at these facts in order to determine what weight should be given to such acceptance. At the time it was received the lead was out of the possession of the trading company, on its way West. That company needed the bill of lading as evidence of title to the property described in it, upon the security of which it desired to raise money, which it could not do without the possession of the bill. Under these circumstances, we refuse to hold that the trading company, in accepting the bill of lading, thereby consented to the complete alteration of its original contract, and without any consideration whatever, agreed to release the railroad company from all liability on that contract, and to take in its stead the reduced liability provided for in the bill of lading.

Of course the company expected a bill of lading, for such an instrument is the usual accompaniment in shipping merchandise. The bill showed the amount of the lead, the

marks and numbers, etc., and so identified the goods as to enable the shippers to show their amount and general value, and to enable them to negotiate the bill and obtain money on its security.

It is agreed in the statement of facts that this bill of lading was received by a clerk of the trading company without stated objection to its terms, but was not read or examined by him, or by any officer of the company, and was immediately hypothecated with a bank as collateral security for the money borrowed thereon by the trading company. We do not state the fact that the bill of lading was not examined, for the purpose of insisting that an examination of such an instrument must always be shown before a contract can be predicated thereon. But where there is a valid contract already in existence, and it is urged that such contract has been abrogated or changed by the receipt of a bill of lading, after goods have passed from the control of the shipper, we think it is important, upon the question of whether such original contract has, in fact, been abrogated, to show that the bill was never read in fact; that the conditions abrogating the original contract were among a number of other conditions printed in the bill in smaller type than the rest of the bill, and that the alleged acquiescence of the trading company in the change of the contract, by virtue of these conditions, is based upon the mere reception of the bill of lading by a clerk without any knowledge of the existence of these conditions, and without evidence of any authority in him to consent to a modification of the contract already made by his employer. The fact, that, in such ignorance, that company hypothecated the bill of lading, adds nothing to the alleged acquiescence. What the contract meant as between the railroad company and the bank or other assignee of the bill of lading is not important here; but, upon these facts, we are unable to see that the receipt and holding of the bill of lading changed the original contract as claimed by the railroad company. See *Bostwick v. Baltimore & O. R. Co.*, 45 N. Y. 712, where it was held, under the circumstances of that case, the mere acceptance of a bill of lading did not alter a previously made oral contract in relation to the shipment.

(5) Even if the receivers of the railroad company contracted to forward the lead by the steamer sailing from Tacoma October 30, it is still insisted that the action of the deputy collector, at Tacoma, in refusing to grant a clearance to the steamship while the lead was on board, made the performance of the agreement not only impossible, but unlawful; and, for that reason, the receivers were absolved from their agreement to forward by that vessel. The contract was not unlawful when made. It may be assumed that the lead was contraband of war; but that fact did not render the contract of transportation illegal, nor absolve the carrier from fulfilling it. It is legal to export articles which are contraband

of war; but the articles, and the ship which carries them, are subject to the risk of capture and forfeiture. *The Santissima Trinidad*, 7 Wheat. 283, 340, 5 L. Ed. 454, 468. Neither any law of the United States, nor any provision of international law, was violated by the making of this contract, nor by an attempt to export the lead pursuant to its provisions. The case does not come within the principle of *Brewster v. Kitchell*, 1 Salk. 198, where it was said that, if one covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed.

No act of Congress was passed, subsequently to the making of the contract, which made it unlawful, and it was lawful when made. It is true that the sailing of the vessel without a clearance would have been unlawful, and the deputy collector refused to grant that necessary document while the lead was on board the steamship. But that did not render unlawful the contract to transport. He had the power to refuse to grant the clearance, and he did refuse unless the lead were taken off. In so doing he undoubtedly violated his duty. He was not justified in exacting any such condition for granting the clearance.

Upon the facts in this case, we are of opinion that this refusal of the deputy collector constituted no defense to the action on the contract. It is not within the exception referred to by Mr. Justice Jackson, in delivering the opinion of the court in *Chicago, M. & St. P. R. Co. v. Hoyt*, 149 U. S. 1, 37 L. Ed. 625, 13 Sup. Ct. Rep. 779. This contract, in view of all the facts, we think was made in contemplation of trouble arising from the character of the lead as contraband of war.

The statement of facts shows that the question of whether the lead might not be excluded from transportation as contraband in view of the war then existing between China and Japan was fully understood before the contract was made, and after it was made, and the steamship refused to carry the lead, the trading company, upon being so informed by Fitch, notified him that they would hold the receivers responsible for failure to fulfil the contract; and thereafter, with the attention of all the parties directed to the subject, it was finally agreed that the lead should be received and transported, and the refusal was then withdrawn.

It is true that the special and particular difficulty was first made by the steamship company which refused to transport the lead, yet, still, the attention of all the parties was, from the very first, directed to the peculiar character of the freight as contraband of war, and whether the contract should on that account be made, or, having been made, whether the shipment should not be refused. The receivers, therefore, knew that there might be difficulty in relation to the transportation, and yet, after full knowledge on the subject, they

agreed to, and did, withdraw their refusal; and they thereupon took the lead for transportation under the contract.

Under these circumstances, it ought not to be held that the mistaken action of the deputy collector in refusing to give the clearance should operate as an excuse for the non-performance of the contract, which was not thereby rendered illegal. It cannot be affirmed that such possible refusal was not within the contemplation of the contracting parties when the contract was made. Many causes, it was known, might operate to obstruct the transportation of articles contraband of war. This particular form of impediment may not have been actually within the minds of the parties to the contract, but there was, as the agreed facts show, present to their minds the fact that there might be trouble in procuring the transportation of the lead because of its character as contraband of war, and in the light of those facts the contract was made, and, in substance, ratified after it was made. The railroad receivers took the risk of this, as of other obstructions, in making the contract, and they ought to be held to it.

As the act of the deputy collector was an erroneous one, and a clearance should have been given while the lead was on board the steamship, we think his refusal should not be at the expense of the shippers, who had obtained this contract for transportation while all parties actually knew the difficulties that might concern the exportation of the lead from Tacoma. The state had not intervened to prevent the performance of the contract, as was the case in *Touteng v. Hubbard*, 3 Bos. & P. 291, where Lord Alvanley held that in such circumstances the party will be excused. In that case there was an embargo laid by the British government, after the contract was made, on all Swedish vessels.

Here there was no intervention of the government of the United States. The exportation of lead was never prohibited by the Treasury Department during the war between China and Japan. There was no change in the law or the policy of this government subsequently to the making of the contract, by which its performance was excused. The exportation of the lead was legal when the contract was made, and continued to be so after the execution of such contract, although the deputy collector mistakenly refused to grant the clearance unless the lead was taken off the vessel. Such mistaken decision did not render the original loading of the lead on the ship unlawful, nor would it have been unlawful for the ship to proceed with the lead on board provided the clearance had been had. It was not an act of the state, therefore, which prevented the sailing of the vessel, within the true meaning of such a term, but a mistaken act of a subordinate official, not justified by law, and not sufficient as an excuse for the nonperformance of the contract in question under the circumstances already detailed. If the bill of lading were regarded as applicable for this purpose, the refusal of the clearance did

Texas & P. Ry. Co. v. Mugg & Dryden

not constitute a "restraint of princes, rulers, or people," within that clause of the bill.

It was one of the contingencies of which the receivers undertook by their special contract of transportation to take the risk. It was not a contract that they should violate the law, but they took the risk of its misapplication, believing of course, that such contingency was most remote, and that, if the steamship company would receive the lead for transportation, the chief obstacle to the fulfilment of the contract would be thereby removed.

After the lead had been unshipped, and within half an hour after the sailing of the vessel, the telegram which the deputy collector had sent to the collector in regard to the matter was answered by the latter in such terms that, undoubtedly, if the ship had been still in port, the lead would have been placed thereon and transported to Japan. The master, however, as soon as the determination of the deputy collector was given, immediately, and without appealing to the collector, unshipped the lead, and sailed for his destination at once. The result of the failure thus to carry the lead on that vessel was that it did not arrive in Yokohama until on or about January 4, 1895, instead of on or about November 18, 1894, which it would have done had it gone forward as contracted for. In the meantime, the war between China and Japan ceased, the value of the lead fell, and the trading company was damaged as stated in the finding of facts.

We think the objections made to this recovery are untenable, and the decree of the court below is, therefore, affirmed.

TEXAS & P. RY. CO. v. MUGG & DRYDEN.

(Supreme Court of Texas, Dec. 15, 1904.)

[83 S. W. Rep. 800.]

Carriers—Misrepresentations as to Freight Rates—Damages.

Where shippers contracted for the sale of coal at a certain price, relying on the representation of the carrier's agent that the freight rate would be as stated, and were compelled to pay a higher rate, the carrier was liable for damages occasioned by the misrepresentation, though the agent named a rate less than that posted in accordance with the interstate commerce law.

Certified question from Court of Civil Appeals of Second Supreme Judicial District.

Action by Mugg & Dryden against the Texas & Pacific Railway Company. From a judgment for plaintiffs, defendant appealed. Certified questions from the Court of Civil Appeals of the Second Judicial District. Questions answered.

T. J. Freeman, Stanley Spoonts & Thompson, and Marshall Spoonts, for appellant.

W. B. Paddock and Robert Harrison, for appellees.

Texas & P. Ry. Co. v. Mugg & Dryden

BROWN, J. Certified question from the Court of Civil Appeals of the Second Supreme Judicial District as follows:

"We deem it advisable to certify to your honors for decision the question whether or not the appellant, Texas & Pacific Railway Company, is liable to the appellees, Mugg & Dryden, upon the following state of facts, said cause being now before us for determination upon appeal from the county court of Tarrant county, Tex. The cause originated in the justice court, from which it was appealed to the county court of Tarrant county, where a trial was had on the following statement of appellee's cause of action, to wit: 'Statement of plaintiffs' cause of action. Damages in the sum of \$140.18, as follows: By reason of defendant making and quoting to plaintiffs a rate of \$1.25 per ton on two cars of coal, and \$1.50 per ton on one car of coal, in January and February, 1903, respectively, from Coal Hill, Ark., to Weatherford, Tex., on which rates so made and quoted plaintiffs relied in contracting said coal shipped and sold at prices based on said rates; whereas defendant assessed and collected of plaintiffs freight at the rate of \$2.75 per ton on said two cars, and \$2.85 per ton on said one car, which said freight rate plaintiffs was forced to pay and did pay under protest in order to obtain said coal and deliver same in compliance with sales previously made. That plaintiffs' loss and damage in the sum aforesaid were occasioned by defendant's negligence in making and quoting to plaintiffs the said rates, on which rate quoted defendant knew plaintiffs relied and based their sales of the said three cars of coal shipped and sold thereafter, and then forcing plaintiffs to pay a greater rate, amounting in the aggregate to the sum of \$140.18, on said three cars of coal, thereby causing plaintiffs loss and damage in the said sum.'

"To this pleading the appellant answered by general demurrer and general denial, and especially denied that it ever entered into any contract for the shipment of coal for appellees from Coal Hill, Ark., to Weatherford, Tex., at the rate alleged in appellees' statement; and, further, that if it ever quoted any such rate to appellees, such quotation was a violation of the interstate commerce act, and was a lower rate than the interstate rate in effect at the time shipment was made, which had been duly published, printed, and posted in its depot and stations as required by the terms of the act; and, further, that it collected for appellees the exact rate prescribed for such commodity under said act, and that such contract, if any was made, was in violation of law and void. Upon a trial without a jury judgment was rendered for the appellees for the amount sued for and all costs of suit.

"It is agreed by the parties that the rate charged and collected on the shipments of coal in controversy from Coal Hill, Ark., to Weatherford, Tex., as shown in appellees' statement of cause of action, was the regular rate in effect

Texas & P. Ry. Co. v. Mugg & Dryden

at the time the shipments were made, as shown by the printed and published schedules of the Texas & Pacific Railway Company on file with the interstate commerce commission, and posted in the stations of said railway company, as required by the interstate commerce act. There is no assignment challenging the sufficiency of the evidence to support the material allegations of appellees' pleadings."

We answer that the railroad company is liable to the appellees for damages occasioned by the misrepresentation of the rate of freight as shown by the statement of facts. The authority of the agent who stated the rate to the appellees is not questioned. The fact that the agent named a rate less than that which was in effect at the time, and which was posted according to the interstate commerce law, will not avoid the claim of the appellees for damages arising out of the misrepresentation of the appellant's station agent. It is true that if the agent had made a contract with the appellees for the shipment of the coal from Coal Hill, Ark., to Weatherford, Tex., at the rate stated by him, that contract could not have been enforced, because it would have been in violation of the interstate commerce law. But this suit was not brought upon such contract for its enforcement; there was no contract; it is an action for damages occasioned to the appellees by the misrepresentation of the agent of the railroad company, whereby the appellees were caused to make a contract for the sale of coal at a certain price, relying upon the representation by appellant's agent that the freight rate would be as stated, whereas the appellees were compelled to pay a higher rate, and thus the damages arising to the appellees were occasioned by the misstatement which induced them to make the investment in the coal and the contract for its sale. *Pond-Decker Lumber Co. v. Spencer*, 86 Fed. 846, 30 C. C. A. 430; *Missouri Pacific Ry. Co. v. Crowell Lumber Co.* (Neb.) 70 N. W. 964. The two cases cited are very similar in their facts to this. In *Pond-Decker Lumber Co. v. Spencer* the identical question here presented was raised and decided in accordance with our opinion, although there are some facts in the case which would distinguish it from this upon other points, and the case might have been decided, possibly, without deciding the question involved here, yet the question was involved in that case, and was decided by the court; it is therefore authority for the answer that we have made. The second case cited above determines the question of the right of a shipper to recover damages accruing by reason of the misrepresentation of a freight rate, and was based upon facts very similar to those certified in this case.

YAZOO & M. V. R. CO. v. GEORGIA HOME INS. CO.

(Supreme Court of Mississippi, Dec. 5, 1904.)

[37 So. Rep. 500.]

Carriers—Baggage—Business Papers.*

Memoranda and papers in the possession of an agent, but relating exclusively to the business of his principal, and carried by the agent solely for business purposes, are not baggage, when put by the agent in his trunk; and, in the absence of a consent or custom of the railroad to accept such papers as baggage, no damages can be recovered, either for the loss of the papers, or for delay in their shipment and delivery.

Appeal from Circuit Court, Warren County; Geo. Anderson, Judge.

"To be officially reported."

Action by Dana Blackmar, to the use of the Georgia Home Insurance Company, against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Dana Blackmar was the agent of the Georgia Home Insurance Company, and on July 1, 1903, purchased a ticket over the Yazoo & Mississippi Valley Railroad from Natchez, Miss., to Baton Rouge, La., both points being on said railroad. He checked his trunk to Baton Rouge. The trunk contained his wearing apparel and all the papers pertaining to his business. Blackmar was the special agent and inspector for the Georgia Home Insurance Company. The trunk was not delivered at Baton Rouge promptly, and Blackmar left there with instructions to the agent there to send the trunk to New Orleans. The trunk was delayed, and was not delivered to him in New Orleans until July 11th. Blackmar claimed that the delay in the delivery of the trunk caused him to lose six days' time, and to pay hotel bill for six days, and to pay \$2 for telegrams in his effort to recover the trunk. The Georgia Home Insurance Company brought this suit in a justice of the peace court in the name of said Blackmar, for its use, to recover \$10 per day for the six days' lost by Blackmar, this being the amount paid him as salary, the sum of \$36, hotel bill, and other expenses, \$2, and recovered a judgment for the amount sued for—in all, \$98. Defendant appealed to the circuit court, and plaintiff recovered a judgment there for the same amount. Defendant's motion for a new trial was overruled, and it appeals.

Mayes & Longstreet, for appellant.

McLaurin, Armstead & Brien, for appellee.

WHITFIELD, C. J. Perhaps the definition given by Chief Justice Cockburn in *Macrow v. Great Western Railway*

*As to what constitutes baggage, see foot-note appended to *Yazoo & M. V. R. Co. v. Baldwin* (Tenn.), 12 R. R. R. 856, 35 Am. & Eng. R. Cas., N. S., 856.

Co., L. R. 6 Q. B. 622, is as accurate a definition of "baggage" as can be found. That definition is this: "We hold the true rule to be that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal baggage. This would include not only all articles of apparel, whether for use or ornament, but also the gun case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying. On the other hand, the term 'ordinary luggage' being thus confined to that which is personal to the passenger, and carried for his use or convenience, it follows that what is carried for the purposes of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage, unless accepted as such by the carrier." The sheets of paper constituting the memoranda of the agent, Mr. Blackmar, are manifestly papers relating exclusively to the business of his company. We are unable to concur in the view that they can in any proper or legal sense fall within the legal definition of baggage. They are not such things as were for his personal use or his personal convenience. Their use was in no sense personal to the traveler. On the contrary, they were carried, distinctly and exclusively, "for the purposes of business," to quote the definition of Chief Justice Cockburn. They were not legally or properly put as baggage in his trunk, and, not being properly put there as baggage, no damages can be recovered for delay in their shipment in the trunk. It would therefore make no difference whether the suit was one brought for loss of these papers as constituting properly a part of the baggage of Mr. Blackmar, or was one "for damages sustained by appellee on a breach of contract, because of the loss of time enforced on appellee's agent by reason of the inexcusable delay of appellant in delivering his trunk." Counsel for appellee say that the suit is of the latter character, and that learned counsel for appellant misconceive it as a suit of the former kind. But whether one or the other, if the memoranda are not properly baggage, nothing can be recovered as constituting the value of the memoranda, nor can anything be recovered as damages for delay in shipping. It must be said that the record is very vague and indefinite in giving an exact description of these memoranda, but it seems clear that the papers were the papers of the master, the insurance company, and not of this agent, and that they were not designed for his personal use or convenience or comfort, but strictly

and distinctly as business papers in the transaction of the business of his master. We think it is clear, on a careful reading of the authorities cited on both sides, that no papers of the latter kind are in any proper or just sense baggage. And we understand this to be the doctrine as declared in *Miss. Central R. R. v. Kennedy*, 41 Miss. 678. The railroad knew nothing about these memoranda being in the trunk, and it is not a case where the railroad company has consented to receive or accepted these memoranda as baggage knowingly, or in accordance with any usage or custom of the railroad. To hold these papers and documents—so important that their delay for a single day might involve a loss of from ten to fifty thousand dollars to the insurance company; papers and documents concededly the property of the company, and not of the agent; papers and documents which relate exclusively to the conduct of the business of the company, and which are in no way needed for the personal comfort, convenience, or use of the agent—constitute baggage, would be to expand the definition of baggage beyond anything warranted by any well-considered case. We have carefully considered the two strongest cases cited by learned counsel for appellee—*Staub v. Kendrick* (Ind. Sup.) 23 N. E. 79, 6 L. R. A. 619, and *Gleason v. Goodrich Transportation Co.* (Wis.) 14 Am. Rep. 716—but we do not think either in point here. In the *Gleason Case* the book which contained the prices of all the component parts of Sheffield goods was the personal property of the agent; the suit there being for the value of the book specially as such. And so in the other case the suit, again, was for the value of an illustrated catalogue prepared by the agent himself, being his own personal property, estimated to be worth \$50. These cases are much the strongest cited by learned counsel for appellee, but we think the decisive weight of authority, as well as these cases properly considered, would exclude memoranda, such as those involved in this suit, from the category of personal baggage. See *Mauritz v. N. Y. (C. C.)* 23 Fed. 765, and, for a valuable discussion, *Choctaw, etc., v. Zwirtz* (Okl.) 73 Pac. 941.

It follows that the judgment must be reversed and the case remanded for a new trial. Reversed and remanded.

FIELDING *v.* CHICAGO, B. & Q. R. CO.

(Supreme Court of Nebraska, Dec. 21, 1904.)

[101 N. W. Rep. 1022.]

Injury to Employee—Contributory Negligence.*

Upon the undisputed evidence the trial court rightfully directed a verdict for the defendant.

(Syllabus by the Court.)

Commissioners' Opinion. Error to District Court, Custer County; Grimes, Judge.

Action by Peter B. Fielding against the Chicago, Burlington & Quincy Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

C. W. Beal and N. T. Gadd, for plaintiff in error.

J. W. Deweese and Frank E. Bishop, for defendant in error.

AMES, C. Plaintiff, Fielding, was a section hand, and Anderson was his foreman, employed by the defendant company at Mason City, in this state. The track extends easterly and westerly past the station. At some point west of the station the two men loaded some railway ties on a push car. Fielding placed himself at the west end of the north side of the car and pushed it eastward. Anderson followed along at the west end of the south side, and as the car moved forward threw or pushed the ties off from it at intervals, so that they fell at the south side of the track and remained where they struck the ground. After they had traveled some distance and the ties had all been removed in this manner, Anderson told Fielding to return westward with the empty car to the starting point. The latter then went to the east end of the south side of the car, and sat down upon it with his back toward the west and with his right foot hanging down so as to come in contact with the south ends of the ties upon which the track was laid, and began propelling the car westward by kicking and pushing against them. It was broad daylight; the man had co-operated in placing the loose ties where they were, which was in plain sight, and both knew that some of them were lying very close to the track, in violation of the rule of the company forbidding such things to be left by sectionmen nearer thereto than three feet. Fielding did not look westward in the direction which he was pushing the car, or make any particular or especial ob-

*Assumption of risks and contributory negligence with respect to obstructions near track, see foot-notes appended to *Illinois Terminal R. Co. v. Thompson* (Ill.), 12 R. R. R. 683, 35 Am. & Eng. R. Cas., N. S., 683.

As to whether a foreman is a fellow servant of a hand working under him, see foot-note appended to *Fogarty v. St. Louis Transfer Co.* (Mo.), 11 R. R. R. 578, 34 Am. & Eng. R. Cas., N. S., 578.

Lesch v. Great Northern Ry. Co

servation respecting the position of the loose ties. After he had gone some distance his attention was attracted by a call from Anderson, and while he was looking towards him his right foot, with which he was "kicking ties," was caught between a loose tie, lying within a few inches of the track, and the flange of the car wheel, and injured thereby. This action was brought to recover damages for the injury. The petition is in the usual form, and the answer is a general denial, coupled with a plea of contributory negligence. There is no conflict in the evidence, and at the conclusion of the trial Judge Grimes directed a verdict for the defendant, and rendered judgment accordingly. The plaintiff prosecutes error.

If Anderson was guilty of negligence in the manner in which he distributed the ties and in permitting them to remain where they alighted, Fielding, who was an experienced workman of mature years and acquainted with the rules of the company, was fully aware of that fact, and participated in the fault. The plaintiff did, and was required to do, nothing by the command or direction of Anderson that contributed to the injury, of which the manner in which he propelled the car, and his lack of care in so doing, was the sole proximate cause.

It is recommended that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be affirmed.

LESCH *v.* GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, Dec. 16, 1904.)

[101 N. W. Rep. 965.]

Master and Servant—Torts of Servant—Liability of Master.*

Under the claim of plaintiff, two watchmen were employed by defendant to remain at its shops and yards to protect its property from being removed or purloined by trespassers, and were authorized to search for such property when taken away. Upon information that some ties had been removed to plaintiff's home, they went there, entered her house, rummaged the premises, and conducted themselves in a brutal manner, so as to excite fear that they were burglars, thereby seriously frightening plaintiff: *held*, that the facts stated brought the case within the general rule that a master is responsible for the torts of his servants, if committed with a view of the furtherance of the master's business, whether the same be negligently or willfully done.

(Syllabus by the Court.)

*As to whether a railroad company is liable for the willful or malicious torts of its employees, see foot-note appended to *Louisville & N. R. Co. v. Rountt* (Ky.), 10 R. R. 344, 33 Am. & Eng. R. Cas., N. S., 344; foot-note appended to *Riser v. Southern Ry. Co.* (S. Car.), 10 R. R. 244, 33 Am. & Eng. R. Cas., N. S., 244.

Lesch v. Great Northern Ry. Co

Appeal from District Court, Ramsey County; William Louis Kelly, Judge. Action by Caroline Lesch against the Great Northern Railway Company. Verdict for plaintiff. From an order denying a motion for judgment, but granting a new trial, defendant appeals. Affirmed.

M. L. Countryman, for appellant.
Warren H. Mead, for respondent.

LOVELY, J. Action against defendant for alleged trespasses of two of its employees at the home premises of plaintiff. She recovered a verdict. Defendant made the alternative motion for judgment or a new trial. The court denied the motion for judgment, but granted a new trial. Plaintiff acquiesced in the order for a new trial. Defendant appeals from the denial of its motion for judgment.

Upon this review, we are only authorized to determine whether there is evidence reasonably tending to support the plaintiff's cause of action, under the theory upon which it was submitted.

The testimony tends to show that the acts complained of were committed by two persons, McKenna and Fanger, who were employed by defendant as watchmen in its St. Paul shops and yards, about two or three blocks distant from plaintiff's home, where the alleged trespasses are claimed to have occurred. It appears from the evidence that it was the duty of McKenna and Fanger to watch the defendant's railroad yards, keep persons from breaking into the same or purloining property therefrom, look after and search for any property of the company that had been taken away, and protect the company's interests in that respect generally. Some railroad ties were missed from the defendant's yard, and attention was directed to the house of the plaintiff, where it was supposed they had been taken. About 10 o'clock in the forenoon of the day, while the watchmen were engaged in the master's services, they went to plaintiff's house, and a sharp conflict arose on the evidence as to what occurred at the house between these persons, who were witnesses for defendant, and plaintiff, who testified in her own behalf. The watchmen claim that they were on the premises to find the ties, and went into plaintiff's house solely in acceptance of her invitation, which she denied; that some tools with marks indicating defendant's ownership were found, which were laid aside. Plaintiff stated that the watchmen, while in the house, opened trunks containing the clothing of herself and family, and rummaged the premises, making themselves obnoxious generally; that their conduct was overbearing and brutal in the extreme, by reason of which she was seriously frightened, became sick, and suffered substantial damages. This was denied by the watchmen, but upon the issues of fact thus made there was a fair question of fact whether the de-

Peterson v. New York, etc., R. Co

defendant's watchmen were trespassers, and at the time committed any wrongful act in seeking to find the defendant's property, which they were employed to make search for and recover.

The sole contention of defendant on its motion for judgment is that the defendant is not liable for the acts of its watchmen, since the trespasses perpetrated as asserted by plaintiff were outside the scope of their employment, and not in the furtherance of the services they were engaged to perform. It does not appear to us that there can be very much doubt that the testimony reasonably tends to support the claim that the acts of the watchmen in searching for the property belonging to defendant, claimed to have been taken from its yards, bring the case within the general rule that a master is responsible for the torts of his servants, done with a view to the furtherance of the master's business, whether the same be negligently or willfully done, since it was apparently within the scope of such servants' agency. *Mulvehill v. Bates*, 31 Minn. 364, 17 N. W. 959, 47 Am. Rep. 796; *Ellegard v. Ackland*, 43 Minn. 352, 45 N. W. 715; *Brazil v. Peterson*, 44 Minn. 212, 46 N. W. 331; *Smith v. Munch*, 65 Minn. 256, 68 N. W. 19.

The order of the trial court is affirmed, and the cause is remanded for a new trial.

PETERSON v. NEW YORK, N. H. & H. R. CO.

(Supreme Court of Errors of Connecticut, Dec. 16, 1904.)

[59 Atl. Rep. 502.]

Appeal—Review.

The rulings of the trial court, consisting of conclusions on the facts found, are reviewable on appeal.

Injury to Servant—Negligence of Fellow Servant.

When a master uses reasonable care to perform his legal duties towards his servants, he is not liable to one of them for an injury received in consequence of the negligence of a fellow servant while both are engaged in the master's work.

Fellow Servants—Injury to Employee Loading Ashes on Car—Negligence of Engineer in Moving Car.*

Plaintiff, employed by a railroad company, was charged with the duty of cleaning out the office of the master mechanic, and of removing ashes from a building containing an engine used to move cars on a turntable. While plaintiff was loading ashes on a car on the turntable, as was his custom, the engineer and his assistant caused the car to be moved, whereby plaintiff, who had not been given proper warning by the others, was injured. Plaintiff was under the general control of the master mechanic, and not subject to control of the engineer; and the engineer was a subforeman under the master mechanic and the general foreman of the repair shops and yard. His duties consisted mainly in operating

*As to whether an engineer is a vice principal or fellow servant with respect to other employees of his company, see foot-note appended to *Louisville & N. R. Co. v. Sullivan* (Ky.), 11 R. R. R. 131, 34 Am. & Eng. R. Cas., N. S., 131.

Peterson v. New York, etc., R. Co

the turntable: *held*, that the parties were fellow servants at the time of the accident.

Master and Servant—Performance of Nonassignable Duties.

The master having furnished reasonably safe machinery and appliances, and furnished the engineer with instructions to be careful, in moving a car, to see that everything was all right, the master was not liable for plaintiff's injuries.

Hamersley, J., dissenting.

Appeal from Superior Court, Hartford County; George W. Wheeler, Judge.

Action by John Peterson against the New York, New Haven & Hartford Railroad Company. From a judgment in favor of plaintiff, defendant appeals. *Reversed.*

Lucius F. Robinson and Ralph O. Wells, for appellant.
William J. McConville, for appellee.

TORRANCE, C. J. The plaintiff, a workman in the service of the defendant, was engaged in loading a car, when other workmen of the defendant negligently caused the car to run against him, knocking him down, and inflicting the injuries of which he complains. Two of the questions upon this appeal are whether the plaintiff was a fellow servant of the men whose negligence caused the injury, within the meaning of the fellow-servant rule, and whether the negligence of the other workmen was the negligence of the defendant. The facts found bearing upon these questions are, in substance, the following: At the time of the injury the plaintiff was at work at the north end of an ash car which stood upon the transfer or turntable. From this table the car could be moved north or south by means of the stationary engine on the table. This engine and table were operated by Grimes, an employee of the defendant. In running the ash car off the table, it was customary to attach a cable to the car, and, as the car moved, to follow and detach the cable; and in this work Grimes required assistance. Just before the injury to the plaintiff, Grimes told his assistant, Maloney, a workman of the defendant, to attach a cable to the north end of the car for the purpose of moving it south. Grimes and Maloney saw the plaintiff at work, and told him they were about to move the car, but did not tell him in which direction it was to be moved. The plaintiff was an ignorant man, and he understood from the warning that the car was to be moved to the north. He then went to work at the south end of the car. Neither Grimes nor Maloney knew of this, and Grimes supposed that the plaintiff had gone to the roundhouse. After telling the plaintiff that the car was to be moved, Grimes went to the engine house on the table, and in about six minutes got up steam and started his engine, and moved the car some seven or eight feet to the south, thereby causing the injury to the plaintiff. Grimes and Maloney were reasonably fit and competent workmen, and the engine and car

could be readily operated by them with reasonable safety. The transfer table and its appurtenances were reasonably safe appliances when operated with proper warnings. From his position when he started the engine, if he had looked, Grimes could have seen the plaintiff at the south end of the car, and "could have known of the peril of the plaintiff, should the car be moved south." "It was the duty of Grimes, under his instructions, to be careful in moving the car off the table, to see that everything was all right, and to have seen that no obstructions were on the track ahead of the car, and ordinary care required him to take such precautions." Grimes took no such precautions, and "his failure to do so was a breach of his instructions, and a failure to use ordinary precautions to avoid accident." It was the duty of Maloney "to have seen that the track was clear. This he did not do, and did not know it was his duty to do." The plaintiff's duties were to remove ashes, cinders, and waste material from the engine house, and to clean up the office of the master mechanic. It was his daily custom to carry said ashes and other material in a wheelbarrow to a car used for removing ashes. The plaintiff was under the general control of the defendant's master mechanic, and under the immediate direction of the general foreman of the repair shops and yard. Grimes was a subforeman under the defendant's master mechanic and the general foreman of the repair shops and yard. His duties consisted mainly in operating the transfer table. "The plaintiff was not subject to Grimes' control, nor associated with him in any of his work." "The defendant, through its master mechanic and the foreman of the repair shops, had given Grimes proper and sufficient instructions as to the management of the engine, and the moving of the cars on and off the transfer table." The court below has found that if Grimes, when he started the car, "had looked casually, he ought to have seen the plaintiff, and, had he looked carefully, he could not fail to have seen him," and, further, that "his failure to see was a breach of his instructions, and was a failure to use ordinary precautions to avoid accident, and that failure is negligence, and the injury to this plaintiff flowed from it."

Upon the facts thus found, the trial court held (1) that the plaintiff and Grimes and Maloney were not at the time of the accident fellow servants, within the meaning of the fellow-servant rule; and (2) that the duty to warn the plaintiff that the car was to be moved south, and to see that the track was clear before it started, was a duty resting upon the master, and that the failure to perform that duty was the negligence of the master. These rulings are reviewable in this court. *Nolan v. New York, N. H. & H. R. Co.*, 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305. They are assigned for error, and will be considered in the order above stated.

When a master uses reasonable care to perform all the

duties towards his servants which the law imposes upon him, he is not liable to one of them for an injury received in consequence of the negligence of a fellow servant while both are engaged in the master's work. This is the settled rule in this state, as recognized in numerous cases, extending from that of *Burke v. Norwich & W. R. Co.*, 34 Conn. 474, down to that of *Whittlesey v. New York, N. H. & H. R. Co.*, 77 Conn. 100, 58 Atl. 459. This rule at times undoubtedly operates harshly, and for that reason it has from time to time been severely criticised; but in all such criticism it is well to remember that, where the master is personally free from blame, the rule of respondeat superior, to which the rule in question forms an exception, is itself a rule that is "technical, harsh, and without any basis of inherent justice." *Loomis, J.*, in *Griswold v. New York & N. E. R. Co.*, 53 Conn. 371, 379, 389, 4 Atl. 261, 55 Am. Rep. 115. So long, however, as the rule remains a part of the law, it is the duty of courts to enforce it. The rule itself is plain enough, and its application in a given case is easy enough, after the question who are or are not fellow servants has been answered; but it furnishes no answer to the difficult question, in what circumstances are workmen of the same master to be regarded as fellow servants, within the meaning of the rule? Upon that question the decisions are in conflict, and no general rule for determining it, applicable in every state, has yet been laid down. In the present case we are not called upon to lay down any general rule concerning this matter. We have only to determine whether, under our own decisions, and others in accord with them, upon the facts found in this case, the plaintiff and Grimes and Maloney were fellow servants, within the meaning of the fellow-servant rule. At the time of the injury they were all employed and paid by the same master, were under the same superintendents and foremen, and were at work together at the same time and place, in furtherance of the same common purpose, namely, the filling and removal of the ash car. Clearly, they were in fact fellow workmen; and, upon principle and the great weight of authority, we think they were, in law, fellow servants, within the meaning of the fellow-servant rule, even though the work of each and the grade of each may have differed from that of the other. The following are a few of the cases in our state and elsewhere in which facts like those in the case at bar were expressly or in effect held to constitute the relation of fellow servant between the workmen of a common master: *Nolan v. New York, N. H. & H. R. Co.*, 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305; *McQueeney v. Norcross*, 75 Conn. 381, 53 Atl. 780, 54 Atl. 301; *Whittlesey v. New York, N. H. & H. R. Co.*, 77 Conn. 100, 58 Atl. 459; *Slater v. Jewitt*, 85 N. Y. 61, 39 Am. Rep. 627; *R. Co. v. Henson*, 61 Ark. 302, 32 S. W. 1079; *Clifford v. Old Colony R. Co.*, 141 Mass. 564, 6 N. E. 751; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432; *New Eng-*

land R. Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181. See, also, the cases in a note to the case of Sofield v. Smelting Co. (N. J.) 46 Atl. 711, 50 L. R. A. 417.

Assuming for the moment that the duty violated in the case at bar was not a duty of the master, we think the court erred in holding that the plaintiff was not a fellow servant of Grimes and Maloney.

The next question is, was the master bound to perform the duty towards the plaintiff which his fellow servants neglected to perform? If it was, then the negligence of the servant was that of the master. *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181. We think, however, that the duty in question here was not that of the master. The defendant had furnished for its workmen reasonably safe machinery and appliances, and fit and competent fellow workmen in sufficient number, and a reasonably safe place in which to work, provided reasonable care was taken to see that the track was clear before moving the car. The defendant had also furnished Grimes with reasonably fit rules and instructions for his guidance in operating the table, which, if obeyed by him, made its operation reasonably safe for all concerned; and, so far as appears, these instructions and rules were generally obeyed and enforced. Having done all this, was it also the duty of the defendant to see that the table was safely operated? We think not. Whether, in a given case, the duty neglected is that of the master or that of a fellow servant, is quite often a troublesome question. The line of demarcation between the negligent acts of a fellow servant, for which the master remains liable, and those for which he does not, is sometimes quite vague and shadowy, and it is not surprising that the decisions upon the subject are conflicting. That line has been defined or described in this way: "It is the line that separates the work of construction, preparation, and preservation from the work of operation. Is the act in question work required to construct, to prepare, to place in a safe location, or to keep in repair the machinery furnished by the employer? If so, it is his personal duty to exercise ordinary care to perform it. Is the act in question required to properly and safely operate the machinery furnished, or to prevent the safe place in which it was furnished from becoming dangerous through its negligent operation? If so, it is the duty of the servants to perform that act, and they, and not the master, assume the risk of negligence in its performance." *St. Louis, etc., R. Co. v. Needham*, 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833, and note. Upon principle and authority, we think the negligent act, in the case at bar, which resulted in injury to the plaintiff, was one for which the master was not liable. The following are a few of the many cases in our own and other states which support this conclusion: *Nolan v. New York, N. H. & H. R. Co.*, 70 Conn. 159, 39 Atl. 115, 43 L. R. A.

Schutz v. Union Ry. Co

305; *Kelly v. New Haven Steamboat Co.*, 74 Conn. 343, 347, 50 Atl. 871, 57 L. R. A. 494, 92 Am. St. Rep. 220; *McQueeney v. Norcross*, 75 Conn. 381, 387, 53 Atl. 780, 54 Atl. 301; *Leonard v. Mallory*, 75 Conn. 433, 434, 53 Atl. 778; *Whittlesey v. New York, N. H. & H. R. Co.*, 77 Conn. 100, 103, 58 Atl. 459; *Lundquist v. R. Co.*, 65 Minn. 387-389, 67 N. W. 1006; *Portance v. Lehigh Valley Coal Co.*, 101 Wis. 574, 77 N. W. 875, 70 Am. St. Rep. 932; *Sofield v. Smelting Co.*, 64 N. J. Law., 605, 46 Atl. 711, 50 L. R. A. 417, and note; *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627; *R. Co. v. Henderson*, 37 Ohio St. 549; *R. Co. v. Tohill*, 143 Ind. 49, 41 N. E. 709, 42 N. E. 352; *Rutledge v. R. Co.*, 123 Mo. 121, 24 S. W. 1053, 27 S. W. 327; *New England R. Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181, and cases therein cited and commented upon.

In this view of the case, the trial court erred in holding the master liable to the plaintiff for the negligent acts which caused the plaintiff's injuries; and for this reason, without noticing any of the other errors assigned, the judgment must be set aside.

There is error. The judgment is set aside, and the cause remanded for an assessment of, and judgment for, nominal damages. The other judges concurred, except **HAMERSLEY, J.**, who dissented.

SCHUTZ v. UNION RY. CO. OF NEW YORK CITY.

(Court of Appeals of New York, Feb. 15, 1905.)

[73 N. E. Rep. 491.]

Trial—Objections to Evidence.

Where an objection is taken to evidence and overruled, and exception taken, it is unnecessary to object to a second question of the same character.

Injury to Street Car Conductor—Derailment—Expert Testimony—Spreading of Track.*

Plaintiff, a street car conductor, sued for injuries caused by the derailling of a train running around a curve at a speed of about eight miles an hour. The rails were spread, and the right forward wheel

*For the authorities in this series on the question of the admissibility of expert testimony and opinion evidence, see *Halverson v. Seattle Electric Co.* (Wash.), 13 R. R. R. 282, 36 Am. & Eng. R. Cas., N. S., 282 (motorman's competency to testify as to proper speed to run car into curve); *Heinze v. Metropolitan St. Ry. Co.* (Mo.), 13 R. R. R. 107, 36 Am. & Eng. R. Cas., N. S., 107 (motorman could testify as an expert as to distance within which car could be stopped); *Illinois Cent. R. Co. v. Prickett* (Ill.), 13 R. R. R. 139, 36 Am. & Eng. R. Cas., N. S., 139 (nonexpert testimony to show age of defects in boiler); *Norfolk & W. Ry. Co. v. Briggs* (Va.), 13 R. R. R. 201, 36 Am. & Eng. R. Cas., N. S., 201 (speed of trains or street cars); *Cronk v. Wabash R. Co.* (Iowa), 12 R. R. R. 429, 35 Am. & Eng. R. Cas., N. S., 429 (expert testimony as to whether alignment of rails may be disturbed by car); *Carson v. Southern Ry. Co.* (S. Car.), 12 R. R. R. 337, 35 Am. & Eng. R. Cas., N.

Schutz v. Union Ry. Co

was worn, and the flange chipped. A motorman and a mechanic of 20 years' experience testified, as experts, that the derailment, in their opinion, was caused by the track having spread, and by the defect in the flange of the forward wheel: *held* error, as it was a question for the jury to determine the cause of the derailment, and was not a case requiring their opinion, even if the witnesses had been experts.

Appeal from Supreme Court, Appellate Division, Second Department.

Ation by Friedrich Otto Schutz against the Union Railway Company of New York City. From a judgment of the Appellate Division (84 N. Y. Supp. 1145, 88 App. Div. 615), affirming a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Charles F. Brown, Bayard H. Ames, and Henry A. Robinson, for appellant.

William H. Leonad Edwards, for respondent.

BARTLETT, J. This action was brought to recover damages for personal injuries. The plaintiff on the 24th day of May, 1899, was a conductor in charge of an open car on the defendant's railway. The accident happened on Westchester avenue, between Glebe avenue, and Avenue B, in the borough of the Bronx, on a curve varying from $6\frac{1}{2}$ to $8\frac{1}{2}$ degrees, and the grade descending toward Avenue B was from 1

S., 337 (opinion of witness as to whether accident to employee would have happened if he had reported a defect in machinery was inadmissible); *Atlanta Ry. & Power Co. v. Monk* (Ga.), 9 R. R. R. 426, 32 Am. & Eng. R. Cas., N. S., 426 (expert testimony as to within what distance car may be stopped); *Louisville & N. R. Co. v. Landers* (Ala.), 6 R. R. R. 96, 29 Am. & Eng. R. Cas., N. S., 96 (expert testimony as to value of cattle); *Texas & Pac. R. Co. v. Watson* (U. S.), 7 R. R. R. 634, 30 Am. & Eng. R. Cas., N. S., 634 (expert testimony in actions for injuries from fires); *Cheek v. Oak Grove Lumber Co.* (N. Car.), 10 R. R. R. 667, 33 Am. & Eng. R. Cas., N. S., 667 (opinion of engineer as to sufficiency of spark arresters); *Duree v. Chicago, etc., Ry. Co.* (Iowa), 6 R. R. R. 369, 29 Am. & Eng. R. Cas., N. S., 369 (expert testimony as to whether cinder injuring section hand was hot); *Morisette v. Canadian Pac. Ry. Co.* (Vt.), 10 R. R. R. 383, 33 Am. & Eng. R. Cas., N. S., 383 (expert testimony of injured brakeman as to necessity of proximity of switch to track; and opinion of brakeman struck by switch lantern, while riding on side of car, to show size and shape of such lanterns); *Chicago & E. I. R. Co. v. Randolph* (Ill.), 6 R. R. R. 632, 29 Am. & Eng. R. Cas., N. S., 632; *Gulf, etc., Ry. Co. v. Matthews* (Tex.), 1 R. R. R. 580, 24 Am. & Eng. R. Cas., N. S., 580 (expert testimony as to whether person was walking, standing or lying on track); *St. Louis, I. M. & S. Ry. Co. v. Jacobs* (Ark.), 4 R. R. R. 314, 27 Am. & Eng. R. Cas., N. S., 314 (opinion evidence as to extent of injuries sustained by cattle in transit); *Louisville & N. R. Co. v. Banks* (Ala.), 2 R. R. R. 359, 25 Am. & Eng. R. Cas., N. S., 359 (expert testimony as to cause of accident, in action for death of employee killed on track); *Olson v. Oregon Short Line R. Co.* (Utah), 2 R. R. R. 797, 25 Am. & Eng. R. Cas., N. S., 797 (opinion evidence as to whether accident could have been avoided); *Louisville & N. R. Co. v. Marbury Lumber Co.* (Ala.), 5 R. R. R. 68, 28 Am. & Eng. R. Cas., N. S., 68 (opinion evidence as to existence of defect in spark arrester, based on size of sparks emitted); *Hicks v. Southern Ry. Co.* (S. Car.), 4 R. R. R. 540, 27 Am. & Eng. R. Cas., N. S., 540 (opinion evidence as to

Schutz v. Union Ry. Co

to 2 per cent. The car was running from Glebe avenue to Avenue B at a speed of between seven and eight miles an hour, when it suddenly left the track; the front platform lying in the ditch, and the rear end remaining on the track. The car ran 18 or 20 feet after it left the rails. At the point of derailment the track was found to be $1\frac{1}{2}$ inches out of gauge; that is, it had spread. On examining the running gear of the car, it was found that the right forward wheel was worn, and the flange thereon chipped. It is claimed by the plaintiff that the cause of the accident was the spreading of the rails, and the defect in the forward wheel. The motorman testified that he was on the front platform of the car, had no power on at the time it left the track, and that the position of his brake was under control. He also stated that his speed was about seven or eight miles an hour. The plaintiff's injuries were a Potts fracture of the ankle, and a lacerated wound of the sole of the foot. He was confined to the hospital four weeks, and was obliged to use crutches in walking for about five months. He recovered a verdict for \$1,500. The Appellate Division affirmed the judgment without opinion, one justice dissenting.

The learned counsel for the defendant and appellant rests his argument for the reversal of this judgment upon two rulings of the trial judge. When the motorman was on the

competency of engineer); *Chicago & A. R. Co. v. Kuckkuck* (Ill.), 5 R. R. 91, 28 Am. & Eng. R. Cas., N. S., 91 (opinion evidence as to viciousness of dog inflicting injury); *Whittlesey v. Burlington, etc., R. Co.* (Iowa), 4 R. R. 680, 27 Am. & Eng. R. Cas., N. S., 680 (testimony of physician as to whether persons who are insane some times appear sane and converse rationally); *Vanarsdell v. Louisville & N. R. Co.* (Ky.), 1 R. R. 61, 24 Am. & Eng. R. Cas., N. S., 61 (opinion evidence as to time within which train could have been stopped); note, 8 Am. & Eng. R. Cas., N. S., 411 (expert and opinion evidence as to amount of damages); note, 11 Am. & Eng. R. Cas., N. S., 640 (opinion of medical experts); note, 17 Am. & Eng. R. Cas., N. S., 481 (expert testimony as to proper position of brakeman on train); note, 12 Am. & Eng. R. Cas., N. S., 854 (expert testimony as to reasonableness of bill for medical services); note, 14 Am. & Eng. R. Cas., N. S., 767 (opinion evidence); *Traver v. Spokane St. Ry. Co.* (Wash.), 22 Am. & Eng. R. Cas., N. S., 759 (expert evidence as to distance within which car may be stopped); *Jeffries v. Seaboard A. K. L. R. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 339 (opinion of engineer as to whether injury to child could have been prevented); *Southern Pac. Co. v. Arnett* (C. C. A.), 23 Am. & Eng. R. Cas., N. S., 794 (opinion evidence as to condition of cattle when loaded on train); *Louisville & N. R. Co. v. Milliken* (Ky.), 14 Am. & Eng. R. Cas., N. S., 742 (opinion of witness as to what constituted contributory negligence was inadmissible); *Louisville & N. R. Co. v. Stewart* (Ala.), 21 Am. & Eng. R. Cas., N. S., 34 (opinion of witness, who was with plaintiff at time of accident, as to possibility of seeing train in time to avoid danger); *Blondel v. St. Paul City R. Co.* (Minn.), 6 Am. & Eng. R. Cas., N. S., 272 (competency of expert a question for trial court); *Central of Georgia Ry. Co. v. Bond* (Ga.), 17 Am. & Eng. R. Cas., N. S., 757 (facts upon which opinion evidence is based must be stated); *Cobb v. St. Louis & H. Ry. Co.* (Mo.), 13 Am. & Eng. R. Cas., N. S., 632 (expert testimony as to safety of bridge, based on evidence); *Goodhart v. Pennsylvania R. Co.* (Pa.), 5 Am. & Eng. R. Cas., N. S., 364 (expert testimony as to value of earning power);

Schutz v. Union Ry. Co

stand he was asked this question: "Assuming that a car is running at the rate of seven or eight miles an hour, on a curve of the degree or radius of the curve on Westchester avenue, between Glebe avenue and Avenue B, at the point where your car left the track on the evening of May 24, 1899, would it, in your opinion, be possible for a car, under those circumstances, to leave the track, if the track were properly laid and in gauge, and the running gear of the car in order?" This question was objected to as incompetent and speculative, and that it is a question for the jury to determine after they have heard all the facts, and it is not for the opinion of the witness. This objection was overruled, and exception taken. The additional question was then asked: "Would it be possible under these circumstances? A. I don't think it would, sir." It is claimed by the plaintiff that this second question was not objected to, but it was clearly within the scope of the objection to the main question. It was simply a suggestion to the witness to proceed after the original objection had been overruled. Even if the objection were not held to apply to the second question, it falls clearly within the rule that where, upon a trial, an objection has once been distinctly raised and overruled, it need not be repeated to the same class of evidence, and an omission to repeat it is not a waiver. *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256, 25 Am.

Hasie v. Alabama & V. Ry. Co. (Miss.), 20 Am. & Eng. R. Cas., N. S., 552 (opinion of fireman as to whether engineer did everything possible to stop train); *International & G. N. R. Co. v. Satterwhite* (Tex. Civ. App.), 12 Am. & Eng. R. Cas., N. S., 214 (opinion as to whether passenger was allowed sufficient time to board train before it was started); *Missouri, K. & T. Ry. Co. v. Merrill* (Kan.), 17 Am. & Eng. R. Cas., N. S., 471 (expert testimony as to proper method by which an employee may pass from one car to another while train is moving); *St. Louis & S. W. Ry. Co. v. Elgin Con. Milk Co.* (Ill.), 13 Am. & Eng. R. Cas., N. S., 112 (expert testimony as to effect of transferring milk from refrigerator cars to box cars); *Louisville & N. R. Co. v. Jones* (Ala.), 23 Am. & Eng. R. Cas., N. S., 224 (as to what are proper appliances); *Pittsburg, C. C. & St. L. Ry. Co. v. Sheppard* (Ohio), 6 Am. & Eng. R. Cas., N. S., 528 (proper tests for car wheels); *Chicago, R. I. & P. R. Co. v. Clonch* (Kan. App.), 3 Am. & Eng. R. Cas., N. S., 240 (opinion evidence that cattle guard could not be constructed at certain point without endangering employees); *Chicago & A. R. Co. v. Glenny* (Ill.), 12 Am. & Eng. R. Cas., N. S., 839 (amount of damages from fire); *St. Louis, I. M. & S. Ry. Co. v. Edwards* (C. C. A.), 8 Am. & Eng. R. Cas., N. S., 402 (delay in transportation of live stock); *Struthers v. Philadelphia & D. C. R. Co.* (Pa.), 4 Am. & Eng. R. Cas., N. S., 207 (eminent domain, real estate experts); *Chicago & N. W. R. Co. v. Cicero* (Ill.), 3 Am. & Eng. R. Cas., N. S., 188 (value of railroad property condemned); *Chicago & G. T. R. Co. v. Burden* (Ind. App.), 3 Am. & Eng. R. Cas., N. S., 447 (value of land condemned); *Denver & R. G. R. Co. v. Roller* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 595 (expert evidence of physician as to cause and permanency of injuries, based on complaint of patient); *Baxter v. Chicago & N. W. Ry. Co.* (Wis.), 16 Am. & Eng. R. Cas., N. S., 476 (expert testimony, when admissible); *Galveston, H. & H. R. Co. v. Bohan* (Tex.), 12 Am. & Eng. R. Cas., N. S., 491 (expert testimony as to proper performance of track walker's duties); *Bush v. Delaware L. & W. R. Co.* (N. Y.), 21 Am. & Eng. R. Cas., N. S., 516 (expert testimony

Rep. 182; *Church v. Howard*, 79 N. Y. 415; *Stephens v. Ely*, 162 N. Y. 79, 56 N. E. 499. The motorman was here treated as an expert, and asked to answer the question which was within the province of the jury to determine on the facts placed before them. It appears from his own evidence that he had been a motorman for four years in the employ of different companies, and it was on this rather brief experience that he was asked to act as an expert witness. For reasons that will be stated later, it is very clear that this ruling of the trial judge presents reversible error.

The second ruling relied upon by the appellant is found in the testimony of one Gorman, a witness sworn on behalf of the plaintiff. He testified: "I am working at present at Jersey City Heights, Secaucus—shop foreman. I have been a railroad man altogether—steam and electric—twenty years." The witness then proceeded to state in detail the various companies for which he had worked. He was asked this question by plaintiff's counsel: "Assuming that a car is running at the rate of seven or eight miles an hour on a curve of the degree or radius of this particular curve on Westchester avenue, between Glebe avenue and Avenue B, and assuming that the track at that point is a inch and three-quarters out of guage, and assuming that the outer forward wheel is worn, and the flange chipped, and that the car leaves the

as to proper bridge material); *Gray v. Chicago, M. & St. P. Ry. Co.* (Ill.), 21 Am. & Eng. R. Cas., N. S., 252 (expert testimony as to what is an accommodation train); *Missouri, etc., Ry. Co. v. Truskett* (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 618 (expert testimony as to loss in value of cattle); *Felaka v. New York Cent. & H. R. Co.* (N. Y.), 7 Am. & Eng. R. Cas., N. S., 772 (opinion as to whether person was drunk); *Missouri, K. & T. R. Co. v. Woods* (Tex.), 2 Am. & Eng. R. Cas., N. S., 519; *Williams v. Houston & Texas Cent. R. Co.* (Tex.), 2 Am. & Eng. R. Cas., N. S., 533 (value of live stock); *Baltimore City Pass. Ry. Co. v. Cooney* (Md.), 11 Am. & Eng. R. Cas., N. S., 759 (opinion of master mechanic as to whether boy could ride by hanging on to ledge of car); *Missouri Pac. Ry. Co. v. Fox* (Neb.), 12 Am. & Eng. R. Cas., N. S., 864 (expert testimony in regard to matters of common knowledge); *Crouse v. Chicago & N. W. Ry. Co.* (Wis.), 14 Am. & Eng. R. Cas., N. S., 780 (answer to hypothetical question by medical expert followed by opinion as to cause of plaintiff's condition); *Schaidler v. Chicago & N. W. Ry. Co.* (Wis.), 15 Am. & Eng. R. Cas., N. S., 105 (sufficiency of hypothetical question propounded to medical expert); *Baxter v. Chicago & N. W. Ry. Co.* (Wis.), 16 Am. & Eng. R. Cas., N. S., 476 (harmless error in hypothetical question as to cause of defect in boiler); *Burnett v. Wilmington, etc., R. Co.* (N. Car.), 7 Am. & Eng. R. Cas., N. S., 773 (error in hypothetical question, propounded to medical expert, as to cause of plaintiff's injuries); *Denver & R. G. R. Co. v. Roller* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 595 (sufficiency of hypothetical question propounded to medical expert); *Missouri Pac. Ry. Co. v. Fox* (Neb.), 12 Am. & Eng. R. Cas., N. S., 864 (hypothetical question, only portion of which calls for expert knowledge); *Williams v. Great Northern Ry. Co.* (Minn.), 7 Am. & Eng. R. Cas., N. S., 230 (hypothetical questions on cross examination of medical expert); *Lehigh & H. Ry. Co. v. Marchant* (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 748 (medical experts); *Handley v. Missouri Pac. Ry. Co.* (Kan.), 16 Am. & Eng. R. Cas., N. S., 674 (opinions of nonexperts); *Cleveland, C. C. & St. L. Ry. Co. v. Gray* (Ind.), 8 Am. & Eng. R. Cas., N. S., 48

track at that point, can you state with reasonable certainty, from your experience as a railroad man, both in railroad construction and in repairing and in operation, what was the cause of that car leaving the track?" This was objected to as speculative and incompetent, and that sufficient foundation had not been laid for it, and that it was assuming the functions of the jury, as that was a question for them to determine. The objection was overruled, and exception taken. The witness answered: "In the first place, that the track was out of guage. In the second place, that the flange of the wheel was not what it ought to be." A motion was then made to strike out this answer, which was denied. The rule as to the admissibility of expert evidence is well stated by Werner, J., in *Dougherty v. Milliken*, 163 N. Y. 527, 533, 57 N. E. 757, 759, 79 Am. St. Rep. 608, as follows: "It may be broadly stated as a general proposition that there are two classes of cases in which expert testimony is admissible. To the one class belong those cases in which the conclusions to be drawn by the jury depend upon the existence of facts which are not common knowledge, and which are peculiarly within the knowledge of men whose experience or study enables them to speak with authority upon the subject. If in such cases the jury, with all the facts before them, can form a conclusion thereon, it is their sole province to do so. In the

(nonexpert testimony as to bodily and mental condition of injured person); *Chicago G. W. Ry. Co. v. Price* (C. C. A.), 16 Am. & Eng. R. Cas., N. S., 324 (opinion of engineer as to condition of roadbed); *Jacob v. Flint & P. M. R. Co.* (Mich.), 2 Am. & Eng. R. Cas., N. S., 383 (opinion of witness as to how she alighted from train); *Wimber v. Iowa Cent. Ry. Co.* (Iowa), 23 Am. & Eng. R. Cas., N. S., 476 (opinion as to authority to start train); *Trott v. Chicago, R. I. & P. Ry. Co.* (Iowa), 21 Am. & Eng. R. Cas., N. S., 391 (opinion as to cause of injury to employee); *Illinois Cent. R. Co. v. Foulks* (Ill.), 23 Am. & Eng. R. Cas., N. S., 664 (opinion as to condition of delayed freight); *Kay v. Glade Creek & R. R. Co.* (W. Va.), 17 Am. & Eng. R. Cas., N. S., 695 (opinion as to amount of damages in condemnation proceeding); *Moan v. Chicago & N. W. Ry. Co.* (Iowa), 21 Am. & Eng. R. Cas., N. S., 609 (opinion as to habitual carefulness of engineer); *Lipcomb v. Houston, etc., Ry. Co.* (Tex.), 23 Am. & Eng. R. Cas., N. S., 401 (opinion as to authority of station agent to employ guard for station); *McGeary v. Old Colony R. R.* (R. I.), 14 Am. & Eng. R. Cas., N. S., 764 (opinion on jury question); *Milam v. Southern Ry. Co.* (S. Car.), 18 Am. & Eng. R. Cas., N. S., 253 (opinion of owner as to damages to live stock in transit); *Holman v. Union St. Ry. Co. of Saginaw* (Mich.), 9 Am. & Eng. R. Cas., N. S., 105 (opinion of doctor as to condition of plaintiff); *Galveston, H. & H. R. Co. v. Bohan* (Tex.), 12 Am. & Eng. R. Cas., N. S., 491 (expert testimony as to necessity of employing track walkers); *Lambertson v. Consolidation Traction Co.* (N. J.), 9 Am. & Eng. R. Cas., N. S., 355 (opinion of physician); *Sewell v. Chicago Term. Trans. R. Co.* (Ill.), 13 Am. & Eng. R. Cas., N. S., 387 (opinion as to benefit to land from construction of road); *Louisville & N. R. Co. v. Milliken* (Ky.), 14 Am. & Eng. R. Cas., N. S., 742 (opinion of witness is not admissible as to matter for the jury to determine from common knowledge); *Robbins v. Brockton St. Ry. Co.* (Mass.), 23 Am. & Eng. R. Cas., N. S., 483 (party cannot be required to answer interrogatory calling for opinion as to cause of railroad collision); *Baltimore & O. R. Co. v. Hellenthal* (C. C. A.), 13 Am. & Eng. R. Cas., N. S., 774

Schutz v. Union Ry. Co

other class we find those cases in which the conclusions to be drawn from the facts stated, as well as knowledge of the facts themselves, depend upon professional or scientific knowledge or skill, not within the range of ordinary training or intelligence. In such cases not only the facts, but the conclusions to which they lead, may be testified to by qualified experts." *Ferguson v. Hubbell*, 97 N. Y. 507, 513, 49 Am. Rep. 544; *Van Wycklen v. City of Brooklyn*, 118 N. Y. 424, 429, 24 N. E. 179. In the case before us we have presented a situation which clearly does not fall within the rule rendering expert testimony admissible. A very simple state of facts was laid before the jury, and the question for them to determine was whether the spreading of the track, and the imperfect condition of the front wheel of his car, under conditions already stated, might have resulted in a derailment. There were no facts here peculiarly within the knowledge of men whose experience and study enable them to speak with authority upon the subject, nor was either of these witnesses to be considered as an expert. In regard to the witness Gorman, who had 20 years' experience as a shop foreman and railroad man on steam and electric roads, it would have been competent to have asked him, on the state of facts disclosed, as to the tendency of a car leaving the track under those conditions. The question propounded was very different, as it required the witness to state the cause of derailment, which, very clearly, was for the jury to determine.

We are of opinion that these rulings of the learned trial judge present reversible error, as it is impossible to say that the defendant was not prejudiced by the admission of this evidence. The judgment and order appealed from should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, O'BRIEN, HAIGHT, VANN, and WERNER, JJ., concur.

Judgment and order reversed, etc.

(person familiar with locus in quo may testify as to whether view was obstructed); *Budd v. Salt Lake City R. Co.* (Utah), 22 Am. & Eng. R. Cas., N. S., 7 (physicians may give opinion as to percentage of patients who recover; and as to how long a person will suffer and be unable to work); *Ward v. Ohio River & C. Ry. Co.* (S. Car.), 12 Am. & Eng. R. Cas., N. S., 854 (physician may testify as to reasonableness of bill for medical services); *Austin & N. W. R. Co. v. McElmurry* (Tex. Civ. App.), 3 Am. & Eng. R. Cas., N. S., 445 (medical experts); *Galveston, H. & H. R. Co. v. Bohan* (Tex.), 12 Am. & Eng. R. Cas., N. S., 492 (range to be given to admission of expert testimony); *McCrary v. Galveston, H. & S. A. R. Co.* (Tex.), 3 Am. & Eng. R. Cas., N. S., 276 (expert testimony as to whether steel rails were properly loaded on car); *United States Mail Line Co. v. Carrollton Furniture Mfg. Co.* (Ky.), 9 Am. & Eng. R. Cas., N. S., 286 (opinion of freight boat captain, based upon appearance of broken glass, that its fracture had been caused by a wreck on a railroad, was not admissible as expert testimony of such fact); *Hurst v. Kansas City, P. & G. R. Co.* (Mo.), 21 Am. & Eng. R. Cas., N. S., 899 (expert testimony as to what constitutes a safe condition of track, in action for injury to brakeman caused by gravel pile in station yard); *Baltimore City Pass. Ry. Co. v. Baer* (Md.), 22 Am. & Eng. R. Cas., N. S., 662 (opinion of physicians as to cause of injury to nervous system).

OSZARK & C. CENT. RY. CO. *v.* MORAN BOLT & NUT MFG. CO.

(Supreme Court of Arkansas, April 15, 1905.)

[86 S. W. Rep. 848.]

Railroads—Construction—Materialmens' Liens.*

One who furnishes material which is used in the construction of a railroad has a lien on the road for the price thereof, regardless of whether the material was sold to the railroad or to its contractors.

Appeal from Circuit Court, Washington County; John N. Tillman, Judge.

Action by the Moran Bolt & Nut Manufacturing Company against the Ozark & Cherokee Central Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. L. Stuckey, for appellant.

J. D. Walker, for appellee.

RIDDICK, J. This is an action at law brought by the Moran Bolt & Nut Manufacturing Company of St. Louis against the Ozark & Cherokee Central Railway Company to recover judgment on an account for bolts, spikes, and other material sold to the North Arkansas & Western Railway Company to be used in the construction of its railroad. Plaintiff alleged that the name of the North Arkansas & West-

*For the authorities in this series on the subject of liens against, and in favor of railroad, see *Park & Co. v. City of Louisville* (Ky.), 12 R. R. R. 536, 35 Am. & Eng. R. Cas., N. S., 536 (local assessment lien); *Julian v. Central Trust Co.* (U. S.), 12 R. R. R. 217, 35 Am. & Eng. R. Cas., N. S., 217 (liability of assets for claims subsequent to mortgage, under North Carolina statute making judgment for torts liens); *Wabash R. Co. v. Pearce* (U. S.), 11 R. R. R. 655, 34 Am. & Eng. R. Cas., N. S., 655 (terminal carrier's right to lien for duties paid on bonded goods); *Flanagan Bank v. Graham* (Ore.), 6 R. R. R. 446, 29 Am. & Eng. R. Cas., N. S., 446 (priority); *Mercantile Trust Co. v. Chicago, P. & St. L. Ry. Co.* (C. C. A.), 8 R. R. R. 859, 31 Am. & Eng. R. Cas., N. S., 859 (whether receiver of company, whose line had constituted portion of consolidated line, was chargeable with notice of vendors' lien on property bought for consolidated line); *Schumacher v. Chicago & N. W. Ry. Co.* (Ill.), 10 R. R. R. 644, 33 Am. & Eng. R. Cas., N. S., 644 (right to lien on freight for car rentals where unreasonable delay in loading); *Omaha Bridge & Terminal Ry. Co. v. Reed* (Neb.), 8 R. R. R. 893, 31 Am. & Eng. R. Cas., N. S., 893 (right of lienholders to award in condemnation proceedings); *Southern Ry. Co. v. Gregg* (Va.), 6 R. R. R. 808, 29 Am. & Eng. R. Cas., N. S., 808 (owner's lien on property condemned enforceable in equity); *Royal Trust Co. v. Washburn, etc.*, R. Co. (C. C. A.), 7 R. R. R. 560, 30 Am. & Eng. R. Cas., N. S., 560 (priority between claims of seller of rails, reserving lien, as against receiver's certificates issued for maintenance of property); *City of Lincoln v. Lincoln St. Ry. Co.* (Neb.), 7 R. R. R. 892, 30 Am. & Eng. R. Cas., N. S., 892 (local assessment lien for street paving superior to mortgage lien); *Flanary v. Kane* (Va.), 10 R. R. R. 172, 33 Am. & Eng. R. Cas., N. S., 172 (not against public policy to decree sale of portion of railroad bed to satisfy prior liens on land); *Choctaw & M. R. Co. v. Sullivan* (Ark.), 3 R. R. R. 505, 26 Am. & Eng. R. Cas., N. S., 505 (Arkansas act of March 31, 1899, providing for materialmens' liens, not applicable to contract executed prior to its passage); *Kent v. Muscatine*,

ern Railway had since the sale of such goods to it by plaintiff been changed to the Ozark & Cherokee Central Railway Company, which latter company had succeeded to all the rights and liabilities of the former company. It is admitted by counsel for the defendant company that it is liable if the material was sold to the North Arkansas & Western Railway Company, but it denies that such company purchased any material from plaintiff, and alleges that plaintiff sold the material to one Bright, a contractor, who had the contract for the construction of the railroad of the defendant. The case was submitted to the court without a jury, who found

N. & S. Ry. Co. (Iowa), 4 R. R. R. 100, 27 Am. & Eng. R. Cas., N. S., 100 (necessity of servant claiming laborer's lien on railroad aid taxes, under Iowa Code); *Ban v. Columbia Southern Ry. Co.* (C. C. A.), 5 R. R. R. 124, 28 Am. & Eng. R. Cas., N. S., 124 (right to enforce mechanic's lien, under statute of Oregon of 1885, against railroad extension); *Cushing v. Chapman* (Mo.), 3 R. R. R. 852, 26 Am. & Eng. R. Cas., N. S., 852 (equitable liens, as against claims of bondholders); *Central R. Co. of New Jersey v. McCartney* (N. J.), 4 R. R. R. 323, 27 Am. & Eng. R. Cas., N. S., 323 (waiver of lien for unpaid freight charges); *Pittsburgh, C., C. & St. L. Ry. Co. v. Fish* (Ind.), 2 R. R. R. 391, 25 Am. & Eng. R. Cas., N. S., 391 (enforcement of local assessment lien against railroad); note, 10 Am. & Eng. R. Cas., N. S., 795 (claims for personal injuries); note, 12 Am. & Eng. R. Cas., N. S., 863 (contractors as laborers); note, 15 Am. & Eng. R. Cas., N. S., 294 (priority); note, 12 Am. & Eng. R. Cas., N. S., 866 (priority of mortgage over claim for car rentals); note, 18 Am. & Eng. R. Cas., N. S., 398 (priority of note for supplies over mortgage); note, 12 Am. & Eng. R. Cas., N. S., 872 (priority of equities arising subsequent to mortgage); note, 9 Am. & Eng. R. Cas., N. S., 190 (expenses of operation and management); foot-note appended to *Hampton v. Norfolk & W. Ry. Co.* (C. C. A.), 12 R. R. R. 165, 35 Am. & Eng. R. Cas., N. S., 165 (preferential claims where foreclosure); foot-note appended to *Mersick v. Hartford, etc., Horse R. Co.* (Conn.), 9 R. R. R. 496, 32 Am. & Eng. R. Cas., N. S., 496 (stoppage in transitu); *Baltimore Trust & Guarantee Co. v. Hofstetter* (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 783 (claims for personal injuries); *Dixon v. Central of Georgia Ry. Co.* (Ga.), 17 Am. & Eng. R. Cas., N. S., 380 (carrier's lien for storage charges); *Swan v. Louisville & N. R. Co.* (Tenn.), 20 Am. & Eng. R. Cas., N. S., 446 (demurrage charges); *St. Louis, A. S. R. Co. v. O'Hara* (Ill.), 14 Am. & Eng. R. Cas., N. S., 817 (car rentals); *Gregg v. Mercantile Trust Co.* (C. C. A.), 22 Am. & Eng. R. Cas., N. S., 484 (claims for legal services, and diversion of income); *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* (Ohio), 18 Am. & Eng. R. Cas., N. S., 397 (claims for equipments); *Terre Haute & I. R. Co. v. Cox* (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 327 (diversion of current earnings); *Johnson v. Miller* (Pa.), 3 Am. & Eng. R. Cas., N. S., 657 (priority); *Chesapeake & O. Ry. Co. v. Atlantic Transp. Co.* (N. J.), 21 Am. & Eng. R. Cas., N. S., 709 (franchise tax levied during receivership as preferential claim); *Savannah, F. & W. Ry. Co. v. Jacksonville, T. & K. W. Ry. Co.* (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 582 (operating express); *Southern R. Co. v. Carnegie Steel Co., Limited* (C. C. A.), 6 Am. & Eng. R. Cas., N. S., 420 (claims for supplies furnished); *Santa Fe Pac. R. Co. v. Bossut* (N. Mex.), 19 Am. & Eng. R. Cas., N. S., 683 (carrier's lien on goods attached in its warehouse); *Veatch v. American Loan & Trust Co.* (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 795 (claims for personal injuries); *Little Rock, H. S. & T. Ry. Co. v. Spencer* (Ark.), 12 Am. & Eng. R. Cas., N. S., 861 (contractors furnishing labor not laborers within statute giving lien); *Grand Trunk Ry. Co. v. Cent. Vt. R. Co.* (Vt.), 11 Am. & Eng. R. Cas., N. S., 693 (enforceability at law of lien upon gross earnings of railroad);

St. Louis, etc., Ry. Co. v. Henry & McNeil

the issues in favor of the plaintiff, and we are of the opinion that the evidence supports the finding both on the point that the action was brought within one year after the right of action accrued and on the question of whether the material was sold to the company or to the contractor, Bright. On the last point the evidence, we admit, is very far from being conclusive, but the testimony of Bright shows beyond question that this material was used in the construction of the defendant's railroad, and it follows that plaintiff has a lien on the road for the price thereof whether it was sold to the company or its contractor. *St. L. I. M. & S. Ry. Co. v. Love* (Ark.) 86 S. W. 395.

On the whole case we are of the opinion that the judgment must be affirmed, and it is so ordered.

ST. LOUIS, I. M. & S. RY. CO. v. HENRY & McNEIL.

(Supreme Court of Arkansas, April 15th, 1905.)

[86 S. E. Rep. 841.]

Railroads—Subcontractors—Supplies—Lines.

One furnishing supplies to a railroad subcontractor has no lien therefor against the railroad.

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by Henry & McNeil against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed.

B. S. Johnson, for appellant.

McCULLOCH, J. This is a suit brought against the railway company for money, feed stuff, and provisions furnished by the plaintiffs to one Lyman, a contractor or subcontractor, while engaged in repairing the road bed of appellant. The court, on plaintiffs' motion, instructed the jury, in substance,

Farrow v. Nashville, etc., R. Co. (Ala.), 5 Am. & Eng. R. Cas., N. S., 704 (inchoate interests and liens not displaced by private conveyance of land for right of way); *Fidelity Loan & Trust Co. v. Douglas* (Iowa), 9 Am. & Eng. R. Cas., N. S., 713 (judgment for personal injuries); *Trust Co. of North America v. Manhattan Trust Co.* (C. C. A.), 6 Am. & Eng. R. Cas., N. S., 220 (landlord's lien upon rolling stock of leased road); *Adams v. G. L., etc., R. Co.* (S. Dak.), 8 Am. & Eng. R. Cas., N. S., 765 (liability of owner of railroad on account of labor lien); *Terre Haute & I. R. Co. v. Harrison* (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 272 (foreclosure); *Penn. Steel Co. v. Georgia R. & Banking Co.* (Ga.), 2 Am. & Eng. R. Cas., N. S., 685; *Trust Co. of New York v. Hennen* (C. C. A.), 13 Am. & Eng. R. Cas., N. S., 409 (judgment for injuries to property preferred to mortgage); *Con. & Building Co. v. Continental Trust Co. of New York* (C. C. A.), 21 Am. & Eng. R. Cas., N. S., 487 (loan to pay interest on mortgage preferred over mortgage); *Rhode Island Locomotive Works v. Continental Trust Co.* (C. C. A.), 21 Am. & Eng. R. Cas., N. S., 481 (unsecured debts).

Holland v. Seaboard Air Line Ry. Co

that, if Lyman was authorized to perform the work upon defendant's line of railroad, defendant was liable in the action for the provisions, etc., furnished by plaintiffs to him or his employees; and refused to instruct the jury, at defendant's request, that defendant was not liable for supplies furnished to Lyman while he was its employee within the meaning of the statute. This case falls within the rule announced in *St. L., I. M. & S. Ry. Co. v. Love*, 86 S. W. 395 (recently decided by this court), that no lien is given by the statute for supplies furnished to the subcontractor.

Reversed and remanded.

HOLLAND v. SEABOARD AIR LINE RY. CO.

(Supreme Court of North Carolina, Dec. 20, 1904.)

[49 S. E. Rep. 359.]

Master and Servant—Negligence—Injuries—Last Clear Chance.*

A brakeman, whose duty it was, when his train went onto a siding, to lock a switch and to remain within 10 feet of it, after his train went onto a siding retired to the caboose; and another train ran into the switch, which was open, whereby he was killed. In an action for the death, it appeared that the engineer of the approaching train, running at a speed of 40 miles per hour, could not have seen the standing train until within 70 or 80 yards of it, owing to a curve at that point: *held*, that the doctrine of "last clear chance" was not applicable as against the railroad.

Clark, C. J., and Douglas, J., dissenting.

Appeal from Superior Court, Moore County; Bryan, Judge.

Action by M. H. Holland, administrator, against the Seaboard Air Line Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. D. Shaw, U. L. Spence, and Murchison & Johnson, for appellant.

W. J. Adams and Seawell & McIver, for appellee.

MONTGOMERY, J. The plaintiff's intestate, employed by the defendant as rear brakeman and flagman on its extra freight train No. 578, going south, was on duty when, on the morning of October 18, 1902, the train passed into the siding over the switch at Kokingham, there to await the passage of other trains of the defendant. He was acquainted with the rules of the company, one of which (rule J) reads as follows: "When a train takes the side track to be met or passed by another train, the conductor or flagman must remain at the switch used by his train to enter the siding, and when the train is clear of the main line and the switch is properly set, he will take a position not less than 10 feet from the

*See generally foot-note appended to *Carter v. Southern Ry. Co.* (N. Car.), 11 R. R. R. 324, 34 Am. & Eng. R. Cas., N. S., 324.

Holland v. Seaboard Air Line Ry. Co

switch and give the 'go ahead' signal to the approaching train, and must remain not less than 10 feet from the switch until the approaching train has entirely passed the switch. No train will pass the switch which has been used by the train in taking the siding, unless the 'all right' signal is given." The signal used after dark must be white. When the train was well on the siding, the conductor went to the railroad office on business, and remained there until the collision hereafter to be described occurred; and the intestate went back to the switch, and, according to the evidence of the conductor, changed it and locked it to the main line. The intestate also had been ordered by the conductor when they left Raleigh that morning to "always, when he headed in a switch, to change it and lock it to the main line, and, in my absence, to look out for the safety of the train." The intestate left the switch, returned to the caboose, at the northern end of his train, entered it, and never returned to the switch. While train No. 578 (intestate's) was on the siding, two trains of the defendant (38 and 40), coming from the south and going north, passed along the main line in safety. Afterwards, probably 20 or 30 minutes, train No. 33, a fast passenger train, with engine and several heavy coaches, coming from the north and going to the south, with the right of way, and at a speed of 40 miles an hour, ran into the switch which the intestate ought to have closed and guarded, under the rules of the company and the instructions of the conductor, and collided with the caboose on train 578, and killed H. L. Holland, the plaintiff's intestate.

On the question of negligence the usual three issues were submitted to the jury, which, with their responses, are as follows: "(1) Was the death of Holland caused by the negligence of the defendant, as alleged in the the complaint? Yes. (2) Did Holland by his own negligence contribute to his death? No. (3) Notwithstanding the contributory negligence of Holland, could the defendant, by the exercise of ordinary care, have prevented his death? Yes."

At the request of the plaintiff, his honor instructed the jury as follows: "If the jury should find from the evidence that the plaintiff's intestate was an employee upon the defendant's train and was killed in the collision of the defendant's trains in the daytime, there is a presumption of negligence upon the part of the defendant, and in that case the burden is thrown upon the defendant to disprove negligence on its part." We think there was error in giving that instruction. So far as passengers are concerned, injuries suffered by them from contact with anything under the control and direction of the carrier, or which the carrier ought to have taken precautions against, or from the want or absence of anything which the carrier ought to have furnished, is sufficient to put him to his proof to show that he was not negligent; and therefore, upon that principle, a prima facie case of negligence is made

Holland v. Seaboard Air Line Ry. Co

out against a carrier upon the mere fact of a collision between trains. 2 Shear. & Red. § 516. In such a case the maxim *res ipsa loquitur* applies. The affair speaks for itself. And it must be that the same rule applies as to employees of a carrier. In such case neither the passenger nor the employee has anything to do with the management or control or with the schedule of the trains. But in the case before us it cannot be said that the maxim *res ipsa loquitur* applies. One of the trains was on a side track, and had been there for some little time. Who was at fault because of the collision—whether the defendant, through its engineer of train 33, or the intestate whose duty it was to guard the switch against train 33—was a matter not explained by the collision itself, but dependent entirely upon the circumstances attendant upon the collision, to be shown by the evidence. And there was evidence, outside of the rules under which he was doing service, going to show that the intestate was negligent. It would be a strange rule of law, if, under such conditions, a presumption of negligence on the part of the carrier, the defendant, should arise upon proof of the collision.

There was another error in the failure of his honor to give to the jury a special instruction, asked by the defendant, in the following words: "If you answer the first issue, 'No,' you need not answer the other issues. That, if you answer the first issue 'Yes' then, under all the evidence, you will answer the second issue 'Yes,' and the third issue 'No.'"
There was exception made by the defendant for the failure to give each of these instructions. We think each of them should have been given. Rule J of the company, which we have quoted in full, and of which the intestate had full notice, required him not only when his train went in on the siding to change the switch, but it also required him to take his position at the switch, and remain not less than 10 feet from it until the approaching train had entirely passed the switch. The whole of the evidence tended to show that he left the switch, and went into the caboose, and was killed in it; having never returned to the switch. There is no dispute about the truth of that evidence, and but one conclusion can be drawn from it, in reason. *Hinshaw v. Railroad*, 118 N. C. 1047, 24 S. E. 426; *Neal v. Railroad*, 112 N. C. 841, 17 S. E. 538. He neglected a duty to stand by and guard that switch, and the court should have instructed the jury to answer the second issue "Yes." It was a question of law, upon all the evidence. The jury answered the second issue "No," notwithstanding all the evidence tended to show that he did, and it is probable that the jury answered that issue as they did because of an erroneous instruction from the judge on that point. The following is that instruction: "If the jury find from the evidence, under the rules of the company, that Holland, the intestate, was required to throw the switch to the main line, lock it, remain at or near it, and failed to

Swartz v. Great Northern Ry. Co

do so, and that by reason of such failure he was killed, and that such failure was the *proximate* [italics ours] cause of death, then he is guilty of contributory negligence, and the jury should answer the second issue 'Yes.'" In actions for negligence, where the three issues are submitted, the matter of proximate cause cannot be considered by the jury on the second issue. *Dunn v. Railroad*, 126 N. C. 343, 35 S. E. 606.

We think, too, the jury should have been instructed to answer the third issue "No." There was evidence tending to show that, because of a sharp curve in the railroad track just before reaching the switch from the direction of Hamlet, the engineer of train 33 was prevented from seeing the switch signal at a greater distance than 70 or 80 yards—a distance too short in which to stop his train if he had discovered the danger signal at the switch; and the plaintiff contends that that faulty construction of the track, taken in connection with the location of the switch, was a continuing negligence on the part of the defendant, and that, even though the plaintiff might have been negligent in leaving the switch, yet the defendant, because of its continuing negligence, had the "last clear chance" to prevent the injury. We are not of that opinion. We think that the proximate cause of the injury was the failure to stand by and guard that switch; to stand there and see that it was locked to the main line; to see that it was kept locked to the main line until the very moment the engine of train 33 reached it; to stand there and see that no other person interfered with it. If he had stood there and discharged his duty, as the rules of the company and the instructions of the conductor required him to do, he could have prevented the accident, even though the engineer had failed to observe, or could not have observed because of a defect in the construction of the track, the signal at the switch in time to have stopped his train before reaching it.

New trial.

SWARTZ v. GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, Nov. 25, 1904.)

[101 N. W. Rep. 504.]

It was the duty and custom of firemen when firing locomotive engines to cull out and throw upon the right of way stones and other useless material. In an action by a sectionman for damages on account of injuries received by a stone hurled from a passing engine by a fireman while engaged in sorting coal, *held*:

Injury to Sectionman—Negligence—Fireman Throwing Out Waste Matter.

That the facts set forth in the complaint with respect to the custom of sorting and disposing of the waste matter constitutes actionable negligence on part of the railway company.

Railroad Work—Fireman Throwing Out Waste Matter.*

That such act of sorting and discarding waste material by the fire-

*See foot-note appended to *Bain v. Northern Pac. Ry. Co.* (Wis.), 12 R. R. R. 31, 35 Am. & Eng. R. Cas., N. S., 31.

Swartz v. Great Northern Ry. Co

men while engaged in feeding their engines is work in connection with the operation of the railroad, and the attendant risk or hazard is one peculiar to such operation.

Injury to Sectionman—Fireman Throwing Out Waste Matter—Fellow Servants—Contributory Negligence.

A sectionman, while engaged in the care of a railway track and right of way, was a fellow servant with those in charge of a passing train, and under the circumstances pleaded he was not guilty of contributory negligence, and did not assume the risk arising from the practice of throwing out the discarded material.

The complaint construed, and *held* to state facts sufficient to constitute a cause of action.

(Syllabus by the Court.)

Appeal from District Court, Ramsey County; Olin B. Lewis, Judge.

Action by Nicholas Swartz against the Great Northern Railway Company. Demurrer to complaint overruled, and defendant appeals. Affirmed.

M. L. Countryman, for appellant.

Dodge, McElwee & Dodge and A. A. Andrews, for respondent.

LEWIS, J. The essential facts set forth in the complaint are that respondent had been in the employ of appellant company as a section foreman for about four years; that there was a railroad yard and side track in the vicinity of the village of Clontarf, Minn., where respondent was working at inspecting and repairing appellant's roadbed and tracks, and that it was his duty also to remove therefrom and from the right of way all grass, weeds, and combustible matter; that appellant used a cheap and inferior quality of coal in its locomotives, containing large quantities of slate and stone, which it was necessary for the fireman engaged in operating the engines to sort out; that it required special skill and care on the part of the fireman, while his engine was running, to properly sort the coal and remove the slate and stone from the tender to the right of way in such manner as not to endanger the lives of the sectionmen who were constantly at work along the track, roadbed, and right of way; that August 28, 1903, one of appellant's locomotives was operated by its engineer and a student fireman, who was known to be incompetent and wholly ignorant of his duties, including the sorting of the coal and the removal of the slate and stone to the right of way while the engine was in motion; that on that day, while respondent was in the performance of his duties at the side track and in the yard near the station of Clontarf, he saw the approaching engine, and stepped aside some 18 feet from the track to a place of safety; that the student fireman so negligently and carelessly performed his duty of sorting and throwing away the slate and stone that one piece, weighing about 10 pounds, was by him thrown against respondent, causing serious injuries. It is further alleged that respondent had no knowledge of the presence of such student

Swartz v. Great Northern Ry. Co

fireman, and that the injuries were caused without any negligence on his part. This complaint was demurred to upon the ground that it did not set forth facts sufficient to constitute a cause of action. Objection to the complaint is based upon three grounds: That no negligent act is pleaded; that the injuries did not arise out of those hazards peculiar to the operation of a railroad, so as to make appellant liable for the acts of a fellow servant, under section 2701, Gen. St. 1894; that respondent was guilty of contributory negligence, or assumed the risk.

1. What kind of coal should be used in its locomotives, and, if an inferior quality was selected, whether the same should be sorted while being loaded into the tenders or by the fireman while feeding the engines, were matters entirely within appellant's right to determine. If, as a matter of economy or expediency, the latter method was adopted, it follows that appellant was obliged to use a reasonable degree of care in getting rid of the slate and stone culled from the coal, if it was necessary to deposit the same upon the right of way. It needs no argument to show that the act of hurling pieces of slate or stone weighing 10 pounds from an engine in motion, so that they land a distance of 18 feet, may be attended with serious consequences to persons upon the right of way. It is also apparent that the act of separating and throwing away debris could be done in a careful manner, so that it would fall upon the right of way not so far distant as likely to come in contact with people in the vicinity of passing trains. Negligence in this respect on the part of appellant and its employees is not excused because it was not alleged that it was the duty of the fireman to be on the lookout for sectionmen and give them warning. Under the general allegations of the complaint that it was the practice to dispose of refuse matter in this manner, the company was required to anticipate that other persons rightfully upon the right of way might be in a hazardous position if the work was not done in a reasonably careful manner. The complaint charges a negligent act on the part of appellant in disposing of the debris.

2. The act of sorting coal and throwing away the waste may or may not be a risk or hazard peculiar to the operation of a railroad. That would depend entirely upon the circumstances. While working upon the roadbed as a sectionman, respondent was a fellow servant with those engaged in running the train. The safety of each depends naturally upon the conduct of the other, and the work of both is peculiar to the railroad service. *Smith v. St. Paul & Duluth Ry. Co.*, 44 Minn. 17, 46 N. W. 149; *Neal v. N. P. Ry. Co.*, 57 Minn. 365, 59 N. W. 312. In *Weisel v. Eastern Ry. Co.*, 79 Minn. 245, 82 N. W. 576, relied upon by appellant, the locomotive had been run upon a side track, and was standing perfectly still, and it was stated in the opinion that under those cir-

cumstances the danger of the contents of the tender being dislodged and falling was not at all different, or in any respect greater, than would exist from a stationary coal bin not connected with the railroad. However, there is a vast difference between the circumstances set forth in the Weisel Case and those now under consideration. The act of separating and discarding the waste matter from the coal upon the right of way while supplying the engine with fuel was just as much a part of the operation of the railroad with respect to risk and hazard arising therefrom to other employees as was the work of the sectionman in taking up rails and putting in new ties in *Blomquist v. G. N. Ry. Co.*, 65 Minn. 69, 67 N. W. 804, or as the work of clearing away a railway wreck, as held in *Kreuzer v. G. N. Ry. Co.*, 83 Minn. 385, 86 N. W. 413. These cases are clearly distinguishable from *Johnson v. St. P. & D. Ry. Co.*, 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419, *La Vallee v. St. P. M. & M. Ry. Co.*, 40 Minn. 249, 41 N. W. 974, and *Pearson v. C., M. & St. P. Ry. Co.*, 47 Minn. 9, 49 N. W. 302.

3. It sufficiently appears from the complaint that respondent knew it was the practice of appellant company to sort stones and slate from the coal while the engines were operated, and his conduct upon the question of contributory negligence or assumption of risk must be considered with reference to that fact. It is alleged that respondent stepped to one side to a place of safety, and, conceding that this is a conclusion, rather than a statement of fact, yet it appears that the distance was 18 feet; and in the exercise of his duties as a sectionman in that vicinity, based upon previous observation as to the manner of throwing out refuse matter on the right of way, it may reasonably be inferred that in removing himself to a distance of 18 feet from the engine he was not guilty of contributory negligence. His conduct must be judged by the nature of the danger, and the degree of care required of him was no more than was commensurate with the risk.

We are inclined to agree with appellant that the complaint was not drawn with a view of setting forth as an independent ground of negligence that the fireman engaged in separating the coal was incompetent to perform his duties as such. The assertions with respect to the inexperience and incompetency of the fireman appear to have been introduced for the purpose of laying stress upon the fact that on the occasion referred to the refuse matter was hurled in a reckless manner to a distance from the engine not reasonably to be anticipated by respondent. On this charge of negligence we hold the complaint insufficient.

Order affirmed.

McDANIEL *v.* CHARLESTON & W. C. R. Co.

(Supreme Court of South Carolina, Nov. 9, 1904.)

[49 S. E. Rep. 2.]

Injury to Employee—Fellow Servant.*

A roadmaster who has control of the wrecking train while at work and attends all wrecks on his division is a fellow servant with the conductor of the train, and cannot recover of the railroad company, where, after the train was divided by an agreement between him and the conductor, the engineer of the wrecking train struck the detached car on which the roadmaster was standing in moving a part of the train under the direction of the conductor.

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Laurens County; Townsend, Judge.

Action by S. G. McDaniel against the Charleston & Western Carolina Railroad Company. From order of nonsuit, plaintiff appeals. Affirmed.

N. B. Dial, S. J. Simpson, and Simpson & Cooper, for appellant.

WOODS, J. This action for damages rested on evidence to this effect: While plaintiff was engaged as roadmaster in clearing a wreck from defendant's roadway, the other portion of the work train ran against the detached flat car on which he was standing with such violence that he was thrown from the car and injured. The work train was operated by a conductor and engineer. Plaintiff, as roadmaster, worked under the direction of the engineer of the railroad, and the conductor of the work train ran his train under orders of the trainmaster; but the plaintiff was familiar with the rules of the railroad company, which required him "to attend in person all accidents" on his division, and provided that "conductors and engineers of work trains will receive instructions from the roadmaster in regard to work to be done by their train." On this occasion plaintiff was actually left by a superior officer in charge of the entire work of removing the wreck. Subsequently he and the conductor of the work train, of their own motion, agreed on a division of the work, and in pursuance of the agreement the work train was parted so that each should have some of the cars. The locomotive was attached to the cars the conductor was using. The accident occurred from these cars being moved violently without warning against the car which the plaintiff was using and on which he was standing. The circuit judge ordered a nonsuit on the ground that, if the injury was due to negligence, it was the negligence of a fellow servant.

The plaintiff's exceptions, as we understand, really involve three propositions which he undertakes to sustain: First.

*See foot-note appended to *Pennsylvania Co. v. Fishack* (C. C. A.), 9 R. R. R. 85, 32 Am. & Eng. R. Cas., N. S., 85.

Virginia & S. W. Ry. Co. v. Bailey

The conductor operating the train was the superior of the roadmaster in the conduct of the work, and had a right to direct or control his services. There is no evidence to sustain this statement; on the contrary, the plaintiff positively confutes it. Second. The plaintiff and the conductor and engineer were engaged in different departments of labor. In the mere running of the work train from place to place, doubtless, to avoid interference with other trains, the conductor received orders from the trainmaster; but when actually at work the rules placed the conductor and crew under the direction of the roadmaster, and in his department of labor. Third. The plaintiff and the conductor and engineer were engaged about a different piece of work. Obviously, removing different pieces of the wreck did not constitute being engaged about different pieces of work, within the meaning of section 15, art. 9, of the Constitution. The common enterprise—the piece of work—was the removal of the wreck. The engine and cars were instrumentalities provided for the purpose, to be used by the conductor and engineer, under the plaintiff as their superior, just as jackscrews and shovels were to be used by others; and the negligent moving of the train stands on the same footing as would the negligent placing of a jackscrew. But aside from the rules of the company and the other evidence indicating that the plaintiff and conductor and engineer were engaged as fellow servants about the same piece of work, the plaintiff testified that he voluntarily agreed with the conductor as to what part of the wreckage each should remove, and the accident occurred while they were working about the common enterprise as fellow servants in conjunction with each other in pursuance of the agreement. Of the many cases on the subject it is only necessary to refer to *Wilson v. Railway Co.*, 51 S. C. 79, 28 S. E. 91, and *Koon v. Railway Co.*, 69 S. C. 101, 48 S. E. 86.

The judgment of this court is that the judgment of the circuit court be affirmed.

VIRGINIA & S. W. RY. CO. v. BAILEY.

(Supreme Court of Appeals of Virginia, Nov. 23, 1904.)

[49 S. E. Rep. 33.]

Harmless Error.

In an action for injuries, error in overruling an objection to an answer was not prejudicial where the witness was afterwards permitted to testify to the same fact without objection.

Injury to Fireman—Coupling Cars—Sudden Jar—Duty of Conductor to Instruct—Instructions—Error Cured.

In an action for injuries to a railroad fireman, refusal to permit defendant to prove that it was not the duty of a conductor to give his brakeman any detailed instructions to go to the end of the cars to which a coupling was to be made was cured by an instruction that the con-

Virginia & S. W. Ry. Co. v. Bailey

ductor was entitled to presume that his brakeman was acquainted with the customary method of performing his duties, and that it was not the conductor's duty to give the brakeman special instructions with reference thereto.

Same—Same—Same—Duty of Conductor—Evidence.

Where, in an action for injuries to a railroad fireman, the negligence charged with reference to the conductor consisted in his permitting the engine to approach cars to which coupling was to be made at a dangerous speed, and that it was his duty to have such knowledge of their situation as would have enabled him to make the coupling with safety, a question asked of a witness as to whether it would not be the duty of the conductor "to know the exact spot at which the cars had been left to which he was going back to couple" was properly disallowed.

Personal Injuries—Damages—Life Tables.*

Where damages were claimed for permanent injuries sustained, mortality tables were admissible to show plaintiff's expectancy.

Same—Same—Same—Negligence of Fellow Servant and Vice Principal—Instructions.

In an action for injuries to a fireman by being thrown from his engine by the impact in making a coupling, it was proper to modify an instruction that, if it was the duty of the brakeman to go with his lantern to the end of the car to which the engine was about to couple, and that he failed to go to the end of the car, and that the accident to plaintiff resulted "solely" from such failure of the brakeman, the jury should find for the defendant, was properly modified by the insertion of the word quoted, where it was also claimed, and the evidence tended to prove, negligence on the part of the conductor of the train as the proximate cause of the injury; the latter being a vice principal as to the fireman, and not his fellow servant, as was the brakeman.

Same—Concurring Negligence of Fellow Servant and Vice Principal—Liability.†

Where the negligence of the conductor of a freight train, who stood in the relation of a vice principal to the fireman, in connection with the negligence of a brakeman, who was the fireman's fellow servant, caused the latter's injury, the railroad was liable therefor as though it alone was blamable.

Same—Same—Same.

In an action for injuries to a fireman by being thrown from his cab by an impact in coupling cars, an instruction that, if it was the conductor's duty to know the location of the cars he was about to couple to, and he did not know such location, yet if, under the circumstances, the conductor believed, and was entitled to believe, that the brakeman would be with his lantern at the end of the car to which it was expected to couple, and, if the brakeman had been there, the accident would not have happened, plaintiff could not recover, was properly refused, as predicated on the concurring negligence of the conductor, a vice principal, and of the brakeman, a fellow servant.

Sufficiency of Evidence.

In an action for injuries to a fireman by being thrown from his car by the impact in coupling cars, evidence held to sustain a verdict for plaintiff.

Appeal.

An objection that the declaration in an action for injuries to a servant was insufficient to support a judgment for plaintiff on the ground that the allegations of negligence were not sufficiently specific cannot be made for the first time on appeal.

*See foot-note appended to *Philip v. Heraty* (Mich.), 12 R. R. R. 39, 35 Am. & Eng. R. Cas., N. S., 39.

†See foot-note appended to *Hicks v. Southern Pac. Co.* (Utah), 12 R. R. R. 332, 35 Am. & Eng. R. Cas., N. S., 332.

Virginia & S. W. Ry. Co. v. Bailey

Error to Corporation Court of Bristol.

Action by D. H. Bailey against the Virginia & Southwestern Railway Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

The instructions referred to in the opinion as given are as follows:

On the part of plaintiff: "(1) The court instructs the jury that when a person enters the employ of a railroad company as fireman he only assumes the ordinary and usual risks that are incident to such employment.

"(2) The court further instructs the jury that the conductor in charge of the train upon which plaintiff was at the time he was injured was a superior officer. Therefore all other employees on said train were subject to his orders.

"(3) The court instructs the jury that, if they should find for the plaintiff, they may, in estimating damages, take into consideration the following: The physical and mental suffering of plaintiff received from his injury, his loss of wages for the time during which he was prevented by said injuries from working, proper compensation for his being unable because of said injuries to follow such a calling or business as he could otherwise have followed, and for moneys expended by plaintiff or for which he is obligated or indebted for medical and surgical attention, medicines, nursing, etc.

"(4) The court further instructs the jury that if they find for the plaintiff they may, in estimating his damages, if they believe his injuries permanent, also take into consideration the plaintiff's probable duration of life, and to show this they may take into consideration the standard mortality tables as showing the probable duration of plaintiff's life under all the proof in this case, and they may also consider the fact that plaintiff is engaged in railroad service, a more hazardous occupation than ordinary vocations of life.

"(5) The court instructs the jury that the plaintiff had a right to presume that the conductor of defendant company would discharge his duties in a careful manner, and in the usual and ordinary way."

On the part of defendant the court gave the following instructions:

"(1) The court instructs the jury that negligence on the part of the defendant cannot be presumed in this case; that it must be shown by the plaintiff by preponderance of testimony, otherwise the plaintiff cannot recover.

"(2) A servant entering the employment of a master assumes such risks as are ordinarily incident to the employment from causes open and obvious, the dangerous character of which he has had the opportunity to observe; and he must exercise reasonable care and caution for his own safety while engaged in the master's service.

"(3) The court instructs the jury that the burden of proving negligence is upon the plaintiff, and that negligence must be proved by affirmative evidence, which must show more than a probability of a negligent act; that a verdict cannot be found upon a mere conjecture; and that there must be affirmative and preponderating proof that the injury here sued for would not have occurred except for the negligent breach of some duty which the defendant owed to the plaintiff.

"(4) The court instructs the jury that if they should believe from the evidence that the injury complained of resulted to the plaintiff as a mere accident resulting from a misunderstanding of signal lights, and not resulting from negligence or fault on the part of the defendant or its conductor, they must find for the defendant, and this although they may believe the plaintiff also was free from fault.

"(5) (As modified.) The court instructs the jury that if they believe from the evidence that it was the duty of W. B. Campbell, the brakeman, under the circumstances in his case, to have gone with his lantern to the end of the car to which the engine was going to couple, and that he failed to go to the end of said car, and that the accident to plaintiff resulted 'solely' from such failure of said brakeman to perform such duty, they will find for the defendant.

"And so, likewise, if they believe from the evidence that said brakeman could have prevented said accident by giving a signal to the approaching train to slow down or stop, and that, under the circumstances in this case, it was his duty to have given such signal, and that he failed to give such signal, and that the accident complained of was 'solely' the result of such failure, they will find for the defendant.

"(6) The jury are further instructed that the conductor in this case had the right to presume that his brakeman Campbell was acquainted with the usual and customary method of performing his duties, and it was not the duty of said conductor to give him special instructions with reference thereto.

"(7) The court further instructs the jury that, although they may believe from the evidence that the defendant was guilty of negligence, yet if they believe from the evidence that the plaintiff was also guilty of negligence, and that, but for the negligence of the latter, the accident would probably not have occurred, they will find for the defendant."

The court, on its own motion, charged:

"The court instructs the jury that if they believe from the evidence that in attempting to make the coupling at the time of the accident the engine approached and struck the cars at a greater rate of speed than reasonably safe and proper, and that by reason thereof the plaintiff, without fault on his part, was thrown from his place and injured, and they shall further believe the accident was caused by the negligence of Conductor Brown, or by the concurrent negligence of Con-

Virginia & S. W. Ry. Co. v. Bailey

ductor Brown and Brakeman Campbell, they shall find for the plaintiff; and, on the other hand, if they believe from the evidence that the accident was caused solely by the negligence of Brakeman Campbell, he is a fellow servant of the plaintiff, and there can be no recovery."

And the court also gave to the jury the instructions above set out and asked for by the defendant, numbered, respectively, 1, 2, 3, 4, 6, and 7, and refused to give instruction No. 8 asked for by defendant, and gave instruction No. 5 asked for by defendant, after having modified the same by inserting the word "solely" in the first paragraph thereof between the words "plaintiff resulted" and the words "from such failure," and by inserting the word "solely" in the second paragraph thereof after the words "complained of was" and before the words "the result of such failure."

Peters & Lavinder, A. H. Blanchard, and Wm. F. Rhea, for plaintiff in error.

Bullitt & Kelly and D. D. Hull, for defendant in error.

KEITH, P. D. H. Bailey, the plaintiff in the court below, was a locomotive fireman in the freight train service of the Virginia & Southwestern Railway Company. On the 16th day of April, 1903, the crew to which he belonged started from Bristol to Big Stone Gap, and arrived at Clinchport, an intermediate point, some time during the night of that day. At Clinchport the crew received orders to shift some cars which were standing on a siding. The engine and tender were accordingly cut loose from the train at the depot, and all of the crew except the flagman went with the engine to do the shifting.

The switch is situated several hundred yards west of the depot, and at the point of the switch there is a railroad bridge, on the main line, over Stock creek. This bridge is 263 feet long. Its eastern end is about 777 feet from the depot, and its western end is 482 feet from the point of the switch. The total distance from the depot to the switch is 1,522 feet. The bridge is about 28 feet higher at its highest point. Upon this switch there was a train of cars, about 20 in number. The purpose of the switching to be done by the crew was to change the position of these cars so as to place one of them, which stood near the west end of the cars, on the switch track, to the rear, or east, end, in position to be loaded. To accomplish this change of position, all the cars on the switch had to be moved and placed on the main line near the depot, and then replaced on the siding.

After placing the car which was to be set on the rear end of the switch next to the engine, the crew proceeded to remove the remaining cars from the switch, and put them down on the main line below the point of the switch. From the point of the switch on the main line to the other end of the switch was a downgrade, so that all of the cars could not be

brought out at once, but several pulls had to be taken at them. At first about eight or ten cars were brought out and placed on the main line. Conductor Brown was actively engaged, taking the full part of a trainman while this was being done, and it appears that he attended to opening and shutting the switch, while Brakeman Campbell rode on the cars and uncoupled them on the main line, cutting them off on this first pull between the car next to the engine and the balance of the cars. Then, holding on to the car next to the engine, they went back into the switch, and brought out another set of cars, which were pushed down on the main line below the switch, Campbell again cutting them off so as to leave the car next to the engine still coupled thereto. When they had cleared the switch, they dropped the car which they had been holding onto down on the far end of the switch track, and then proceeded to replace the other cars back on the siding. After they had replaced all the cars except those first brought out, which would consequently be the last put in, just before starting back with the engine and tender from the switch track for this last pull from the main line, a conversation occurred between Brown and Campbell, as to the substance of which there is a difference between them, and which was not heard by the engineer or fireman. Brown says that he either told Campbell, or that Campbell suggested to him, that he (Campbell) would go across to the cars on the main line if Brown would take the engine around, and that the two reached this understanding. Campbell says that he told Brown he would go across the bridge way (a foot bridge across Stock creek between the main line and the switch) to the main line, and see if all the cars standing there were coupled together, and that this understanding was reached between them. At any rate, Campbell did go across to the main line, and Brown did cut the engine and tender loose, go up to the switch, out on the main line, and back down on the main line with the engine and tender for the last draft of cars. Campbell, who had ridden the cars, had cut the engine and one car loose when the first draft had been placed on the main line. In cutting them off it so happened that they were left partly on and partly off of the bridge, two gondola cars and half of a box car projecting out on the bridge, and the balance of the draft coupled thereto standing east of the bridge. As Brown went back for the last draft of cars, he rode on the rear end of the tender, for the purpose of giving the engineer signals for the coupling, and, as he claims, expected to find Campbell at the end of the cars with his light. He saw Campbell's light at the end of the bridge, and did not signal the engineer to slow down until he got close enough to see the end of the gondola by the light which he himself carried in his hand; in other words, he reached the end of the cars in a shorter distance by the length of two gondolas and half a box car

than he expected. The engineer, in moving the engine, was being guided by the signals given him from Brown's lamp, and was also being influenced in the speed at which he was running by the position of Campbell's light, although his statements and Brown's upon this subject do not entirely correspond. It seems, however, that the cars were closer to the engine and tender than either Brown or the engineer supposed, and, notwithstanding Brown's signal to the engineer immediately upon discovering them, the coupling was made at a greater rate of speed than would have been used had they known the exact location. The automatic coupling was made successfully, nothing was broken, and neither the brakeman, conductor, nor engineer thought that anything very unusual had happened. The plaintiff testifies, however, that he was standing on his side of the engine, looking for signals, and getting ready to fire his engine, and not expecting the coupling to be made; and that when the engine and cars came together he was knocked out of the engine, and fell to the bottom of the bridge, landing in the creek, and sustaining severe injuries. The fact that he had fallen was not discovered by any of the crew until they had gone back over the switch with the last draft of cars.

From this statement of facts it will be seen that the real point in controversy is whether or not Brown, the conductor, knew, or ought to have known, the position of the cars to which he was to couple the engine, and whether or not the rate of speed at which the engine was moving under his direction was such as to constitute negligence.

The jury rendered a verdict for the plaintiff, which the court refused to set aside, and, the defendant in the court below (plaintiff in error here), the Virginia & Southwestern Railway Company, having obtained a writ of error, assigns the following grounds for the reversal of that judgment:

The plaintiff was asked, as a witness in his own behalf:

"Q. If the coupling had been made in the usual or ordinary way, would you or would you not have been thrown from the cab?

"A. No, sir; if they had been coupled in the right manner, I would not have been thrown out."

To this question and answer there was a general objection, which the court overruled. It is claimed in the petition that, while the objections relied upon do not appear in the record, the question and answers were wholly inadmissible for any purpose.

It may be that the question is obnoxious to the objection that it is a leading one, and that the answer expresses the opinion of the witness, and not a fact. Without deciding whether or not either of these objections is well taken, or whether, in any event, it would constitute reversible error, we shall content ourselves with calling attention to the fact that at

another point in the testimony of the plaintiff this question was asked him:

"Q. How did they throw you?"

"A. I went out head foremost. It was an unusual lick. If it had been hit by a lick that cars ought to be coupled, it wouldn't have thrown me. I had hold, and was looking out for it, and always did look out for anything like that when we was shifting."

This question and answer were not objected to, so that, if the error under consideration was sustained, there would still be evidence in the record covering the identical point to which no objection was made.

Objection is also made to the ruling of the court refusing to allow the plaintiff in error to prove by the witness Brown that it was not his duty, as conductor, to give his brakeman, Campbell, any detailed instruction about going to the end of the cars to which the coupling in question was to be made; and a like offer of proof which occurs in the testimony of the witness McCue, which was also rejected by the court.

If the refusal to permit plaintiff in error to introduce the evidence referred to was erroneous, the error was cured by instruction 6 given at the instance of plaintiff in error, in which the court told the jury that the conductor had the right to presume that his brakeman, Campbell, was acquainted with the usual and customary method of performing his duties, and it was not the duty of the conductor to give him special instructions with reference thereto. The plaintiff in error could not have been prejudiced by the ruling of the court excluding evidence tending to show that it was not the duty of the conductor to do a particular act, when the point was covered by an instruction of the court which states that, as a matter of law, no such duty devolved upon him. We refrain from any expression of opinion upon either ruling of the court involved in this assignment of error, except to observe that in the result there was clearly no prejudice to the plaintiff in error.

Another objection taken to the exclusion of testimony is to the refusal of the court to permit McCue, "an experienced railroad man," to prove that it was not the duty of the conductor to know exactly where the cars were left that were being shifted.

There had been direct evidence that it was the duty of the conductor to know. It was proved that the company has no rule upon the subject; and McCue was expected to testify from his general information with respect to the operation of other roads. He was asked this question: "'Where, as in this case, the conductor was attending to the shifting of the cars and also to the switching, would it or not be his duty to know the exact place where the cars had been left to which he was going back to couple?' To which question and

any answer thereto the plaintiff, by counsel, objected, and the court sustained said objection, and refused to allow the witness to answer. Thereupon, without any distinct avowal by counsel for defendant, the court understood from the question and general drift of the examination that, if permitted to do so, the defendant would prove by the said witness McCue that in general railroad practice it would not be necessary or incumbent upon the conductor to give specific directions to the brakeman to go with his light to stand at the end of the train for the purpose of assisting in making the coupling, but that, according to general railroad rules and practice, it would be considered by the conductor that the brakeman would know that it was his duty to go to the end of the cars with his light, without being specifically told so to do; and that where, as in this case, the conductor was attending to the shifting of the cars and also to the switching, it would not be his duty to know the exact spot where the cars had been left to which he was going back to couple. But the court, notwithstanding said statement of counsel, refused to allow the said witness to answer the above questions, and refused to allow the defendant to prove the facts set forth in the above statement of counsel."

So much of this exception No. 3 as refers to the duty of the conductor to give specific directions to the brakeman has already been sufficiently disposed of in discussing the assignment of error with reference to the question asked Conductor Brown; and as to so much of it as has reference to the duty of the conductor to know the exact place where the cars had been left, it is to be observed that the gravamen of the charge of negligence upon the part of the conductor is that he permitted the engine to approach at a dangerous speed the cars to which the coupling was to be made, and that it was his duty to know, not the exact position of those cars, but to have such a reasonable knowledge of their situation as would have enabled him to make the coupling with safety. The question in terms asks the witness, would it not be the duty of the conductor "to know the exact spot which the cars had been left to which he was going back to couple?" To this question the witness would have made the categorical answer that "it was not his duty to know the exact spot"; an answer which would have been or might have been absolutely true as a response to the question in the precise terms in which it was propounded, and yet have been utterly misleading.

The action of the court in allowing the witness Skeen to testify as to the expectancy of life of a man of the age of defendant in error, and in allowing the introduction before the jury of certain mortality tables, is assigned as error.

The expectation of life of the defendant in error was one of the factors to be considered by the jury in ascertaining the compensation to be given him for a permanent injury. The

expectation of life is, of course, incapable of exact ascertainment. All that can be done is to place before the jury the best evidence obtainable, to be considered by them under the direction of the court. Tables of mortality are usually esteemed the safest guides upon the subject, to be taken by the jury and weighed along with other facts and circumstances applicable to the expectation of the particular life under consideration. It is the best method of dealing with the subject of which the nature of the case admits.

The instructions asked for by the plaintiff and given by the court (see copy by Reporter) correctly state the law. Indeed, no objection is urged to any of them except No. 4, which relates to the measure of damages, and which has been sufficiently disposed of in dealing with the admissibility of the testimony of the witness Skeen.

The defendant asked for several instructions, all of which were given except No. 8. Nos. 5 and 6, however, were modified by the court. As originally asked, No. 5 was in the words following:

"The court instructs the jury that if they believe from the evidence that it was the duty of W. R. Campbell, the brakeman, under the circumstances in this case, to have gone with his lantern to the end of the car to which the engine was going to couple, and that he failed to go to the end of said car, and that the accident to plaintiff resulted from such failure of said brakeman to perform such duty, they will find for the defendant."

The modification consisted in inserting the word "solely" after the word "resulted," so as to make it read: If "the accident to plaintiff resulted solely from such failure of said brakeman to perform such duty, they will find for the defendant."

The purpose of the amendment is obvious. There was evidence tending to prove negligence upon the part of the conductor, who was not the fellow servant of the defendant in error, but was, as to him, the vice principal. There was evidence tending to prove negligence upon the part of Campbell, the brakeman, who was the fellow servant of defendant in error. If, therefore, the negligent act which caused the injury was due solely to the misconduct of the fellow servant, the railroad company was not responsible; but if the misconduct of the vice principal entered into and constituted a part of the negligent act which caused the injury, then the courts will not undertake to distribute the fault, but will hold the railroad company responsible as though it alone were guilty. *Norfolk & W. Ry. Co. v. Nuckol's Adm'r*, 91 Va. 193, 21 S. E. 342.

The same principle controls the amendment introduced by the court in the second branch of this instruction, and we are of opinion that the amendments made by the court were proper, and this assignment of error is overruled.

The court also, of its own motion, gave an instruction which we think is, under the evidence in this cause, plainly right, and the objection to which is, therefore, overruled.

This brings us to the consideration of instruction No. 8 asked for by the defendant, and refused by the court. It is as follows:

"The jury are further instructed that, although they may believe from the evidence that it was the duty of Conductor Brown to know the location of the cars that he was going back to couple to, and that he neglected this duty, and did not know the location thereof, yet if they believe from the evidence that said conductor believed, and, under all the circumstances of this case, had the right to believe, that Campbell, the brakeman, would be, with his lantern, at the end of the car to which they expected to couple, and further believed that, if said Campbell had been at the end of said car with said lantern, the accident would not have occurred, they will find for the defendant."

This instruction is predicated upon the concession that it was the duty of Conductor Brown to know the location of the cars he was going to couple to, and that he neglected this duty, and rests the defense upon the ground that the fellow servant was guilty of negligence.

As we have already seen, if Brown, who was the vice principal, was guilty of a fault which entered into and constituted a part of the negligence which resulted in the injury of the plaintiff, then the railroad company is responsible, although Campbell, the brakeman, who was a fellow servant, was also in fault; the court in such cases holding that, where injury to a servant has been caused by the fault of a fellow servant concurring with the negligence of the master, the latter is liable as though he only was at fault. The fault of this instruction is that it is predicated upon the concurring negligence of the conductor, who was the vice principal of the master, and of a fellow servant.

There was a motion to set the verdict aside as contrary to the evidence, which was properly overruled. The testimony, considered as upon a demurrer to evidence, establishes the negligence of the plaintiff in error as being the proximate cause of defendant in error's injury.

The motion in arrest of judgment was also properly overruled.

There was no demurrer to the declaration, and we are not prepared to say that it could have been adjudged insufficient had a demurrer been interposed. If the declaration was less specific in its allegations of negligence than it should have been, we are still of opinion that a judgment upon it should not be arrested. Concede that the evidence went beyond the averments of the declaration, yet it is apparent that the plaintiff in error has suffered no prejudice upon this account, but that it presented its entire case to the jury.

The objection should have been made by the defendant when the infirmity, if it exists, was disclosed. It should not have waited until a verdict had been rendered. If the objection had been made during the trial, the court, if it considered that substantial justice would have been promoted, and that the opposite party would not have been prejudiced thereby, would have allowed the pleadings to be amended on such terms as it deemed reasonable. Code 1887, § 3384 [2 Code 1904, p. 1792]. The observations of Judge Buchanan in the case of *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 801, 22 S. E. 869, are equally applicable here: "If there was such a variance as that complained of, the objection ought to have been made in the trial court, either by objecting to the evidence when offered or by a motion to exclude after the evidence had been received. Section 3384 of the Code was enacted to obviate the difficulties which frequently arise after a trial has been commenced, when it appears that there is a variance between the evidence and allegations in the pleadings, by allowing the pleadings to be amended upon such terms as to continuance and costs as the court may deem reasonable, or by directing the jury to find the facts; and after such finding, if the court be of opinion that the variance was such as could not have prejudiced the opposite party, it gives judgment according to the right of the case.

"The objection now made for the first time should have been made in the court below, so that the plaintiff in that court might have had an opportunity to have moved the court to have adopted the one or the other of the courses provided by the statute. Having failed to do this, we do not think that the question can be raised here for the first time; and this assignment of error must be overruled."

In that case it appears that the objection was made for the first time in this court, while in the case before us it was made in arrest of judgment. The difference is one of degree, rather than of kind. The point is that it should have been made, in the language of Judge Buchanan, "when the evidence was offered, or by a motion to exclude after the evidence had been received." It is manifest that the plaintiff in error has suffered no prejudice in the trial court, that it made a full defense, and that the judgment has been rendered according to the very right of the case.

We are of opinion that there is no error in the record for which the judgment should be reversed.

CULVER v. SOUTH HAVEN & E. R. CO.

(Supreme Court of Michigan, Dec. 14, 1904.)

[101 N. W. Rep. 663.]

Misconduct of Counsel.

Where counsel for both parties are guilty of misconduct, reversal will not be granted for the misconduct of one of them.

Culver v. South Haven & E. R. Co

Testimony at Former Trial.

Where, for the purpose of contradicting plaintiff, the court reporter is sworn, and testifies as to plaintiff's answers to two questions on a former trial, using an abstract from his notes to refresh his recollection, it is not competent for plaintiff to then read to the jury the entire abstract of his testimony on the former trial.

Recovery on Ground Not Pleaded—Instructions.

Where the declaration in an action for injury to a brakeman complains only of a defect in the track, the charge is erroneous in authorizing a recovery for a defect in the coupler.

Injury to Brakeman—Duty of Master as to Condition of Tracks.*

An instruction, in an action for injury to a brakeman from his foot being caught between a bolt and a spike in the track, that it was defendant's duty to keep the space between the rails in a reasonably safe condition for the use of its employees, is erroneous; the company not having the absolute duty to keep its tracks in a reasonably safe condition, but being required only to exercise reasonable watchfulness and care in inspecting its tracks and in keeping them in a reasonably safe condition.

Error to Circuit Court, Van Buren County; John R. Carr, Judge.

Action by William Culver against the South Haven & Eastern Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

Samuel H. Kelley (Edward Maher, of counsel,) for appellant.

T. J. Cavanaugh and L. A. Tabor, for appellee.

MOORE, C. J. The plaintiff sued defendant to recover damages received by him while acting as a brakeman. He recovered a judgment for \$15,000. A motion was made for a new trial, which was overruled. No request was made of the trial judge that he file his reasons for overruling the motion, and none were filed. The case is brought here by defendant by writ of error.

Counsel for defendant contend: (1) The verdict was against the overwhelming weight of the evidence. (2) That Culver was not in the exercise of ordinary care, being guilty of contributory negligence. (3) That the defendant did not receive a fair trial, owing to misconduct. (4) That the learned trial court erred in ruling upon evidence. (5) That the learned trial court erred in charging the jury. We will consider these questions in the order presented.

1 and 2 may be considered together. Was the verdict overwhelmingly against the weight of evidence? Can we say, as a matter of law, Culver was guilty of contributory negligence? Without going into details, we may say an examination of the record satisfies us the plaintiff presented a case making it the duty of the trial judge to submit it to a jury under proper instructions.

3. This assignment of error relates to the conduct of

*See foot-note appended to *Hamilton v. Michigan Cent. R. Co.* (Mich.), 12 R. R. R. 365, 35 Am. & Eng. R. Cas., N. S., 365.

plaintiff's counsel during the taking of testimony and while presenting the case to the jury. We have no hesitancy in saying that if the conduct of Mr. Tabor, about which complaint is made, was the only improper conduct of counsel, we should reverse the case, and direct a new trial. The misconduct, however, was not confined to counsel upon one side. We do not feel it our duty to attempt from this record of nearly 300 pages to decide who of the counsel was most to blame. We do say the conduct of Mr. Tabor on one side and Mr. Mayer on the other was such as ought not to be permitted in any court of record anywhere. The language of Justice Shauck in *Railroad Co. v. Pritschau* (Ohio) 69 N. E. 663, is pertinent here: "If it be assumed that the orderly administration of justice is not to be insisted upon, and that the truth may, by accident, be evolved from such scenes as were here enacted, it is sufficient that the misconduct of counsel was in its natural effect prejudicial to the rights of the plaintiff in error, and it does not appear from the record that it did not in fact result in such prejudice. An examination of the cases cited and others justifies the conclusion that for such misconduct, and even for that which is less flagrant, judgments are always reversed, unless it is made to appear that its natural effect has been averted by court or counsel, or both. * * * Throughout the record a trial judge, personally distinguished for learning and probity, appears as a grieved observer of continued improprieties which he thought himself powerless to suppress. It is entirely clear that he was unable to end them by admonition and entreaty, but he was clothed with ample power to suppress them inexorably. The county in which he sat has the complement of county buildings. * * * It is much more important to observe that the trial judge should not have permitted such conduct on the part of counsel as would result in a mistrial. This was due not only to the parties to the suit, but to the public. * * * The observations of the trial judge from time to time show that he had an intelligent appreciation of the gravity of the offenses which were committed before him. Why he thought it less important to suppress them than to give correct instructions to the jury as to the law of the case does not appear."

4. Did the court err in the admission of evidence? As a rule, he did not, but in one instance we think an error was made, which may have made a difference with the final result. There had been a former trial of the case, in which Mr. Culver was a witness. For the purpose of contradicting him the court reporter was sworn as a witness, and testified as to the answers made by Mr. Culver on the former trial to two questions, using an abstract taken from his notes to refresh his recollection. The plaintiff was then allowed to read to the jury the entire abstract of the testimony given by Mr. Culver on the former trial. We do not think this was com-

Culver v. South Haven & E. R. Co

petent. The other assignments of error in relation to this branch of the case are either not well taken or are not at all likely to occur again.

5. Did the trial judge err in his charge to the jury? He gave all of defendant's requests to charge which it was proper for him to give. With one exception, we think the remaining portion of his charge was a correct statement of the law. It is the claim of plaintiff, and so stated in his declaration, that while attempting to couple a car his foot caught between a bolt which projected through the rail of the track and a spike which projected up from the railroad tie, and while thus caught that he was run down by the car and severely injured. Among other things, the judge charged the jury: "You are instructed that the defendant owed it as a duty to the plaintiff as a brakeman on the road to keep the coupler on the caboose of the train on which he was directed to work in a reasonably safe condition for use, and so it could be safely coupled onto another car at any time when necessary. And if you find that at the time plaintiff was injured it was broken, or out of repair so it could not be safely used or coupled onto another car, and plaintiff was so informed by the conductor; and because of its being so broken or out of repair the conductor directed the plaintiff to go to the car then being backed up to be coupled onto the caboose, but that the coupler on that car was not so constructed that it could be coupled onto the caboose from its sides, but was so constructed that, in order to open it, plaintiff was obliged to go in front of it, between that car and the caboose, and while there in the discharge of his duty, and while in the exercise of ordinary care and prudence, was injured by being run over—then the plaintiff is entitled to recover in this case." It will be observed that this charge would permit the jury to give plaintiff a verdict for a cause of action not stated in his declaration. It is true that in another part of the charge the jury was told plaintiff must make out a case as alleged in his declaration, but we are not able to say it may not have been misled by the charge we have quoted. The court also charged as follows: "You are instructed that it was the defendant's duty to keep the space between the rails and track in a reasonably safe condition for the use of its employees when there in the exercise of their duty." The duty which the law imposes upon the company is to exercise reasonable watchfulness and care in inspecting its tracks and in keeping them in a reasonably safe condition. The law does not impose the absolute duty to keep them in a reasonably safe condition. *Anderson v. M. C. R. Co.*, 107 Mich. 591, 65 N. W. 585; 3 *Elliott on Railroads*, § 1268. Under this instruction, if the company had exercised all ordinary care and watchfulness, and the roadbed had for some reason suddenly become unsafe, the company would be held

Hawley v. Chicago, etc., Ry. Co

liable. To illustrate: If some one had driven the spike there, or immediately after inspection had placed some obstruction upon the roadbed, thereby making it unsafe, the defendant would have been liable.

For the reasons assigned, the judgment is reversed, and a new trial ordered. The other Justices concurred.

HAWLEY v. CHICAGO, B. & O. Ry. CO.

(Circuit Court of Appeals, Seventh Circuit, October 4, 1904.)

[133 Fed. Rep. 150.]

Master and Servant—Injury to Servant—Assumed Risk.*

Defendant railroad company had two switchyards in a city, and plaintiff's intestate had been employed for six months as a switchman in the east yards, having been sent during such time to work in the west yards on perhaps 20 to 25 days. In the west yards there were a number of tracks, and the corner of the roof of a freight house extended to the center of one of such tracks at a height of 3 feet 8 inches above the top of an ordinary freight car and of 1 foot 8 inches above the top of a furniture car. A furniture car was kicked upon such track through a switch 74 feet distant from the roof corner, and decedent, who had climbed on top of it to set the brake, was struck by the projecting roof and killed. Until 4 days previously he had not worked in such yards for 30 days. It did not appear how many times he had set the brakes on cars on such track, or that he had ever ridden a car past the roof projection, nor was it shown that he had actual knowledge of the danger therefrom: *held*, that he could not be charged, as matter of law, with having assumed the risk.

Same—Contributory Negligence—Question for Jury.

Where a switchman was knocked from the top of a car and killed by the corner of the roof of a freight house which projected over a switch track, and the evidence was conflicting as to his actions after mounting the car and his position when struck, the question of his contributory negligence was one for the jury.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Samuel Alschuler, for plaintiff in error.

Albert J. Hopkins, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges

BAKER, Circuit Judge. Action by administrator to recover damages for the alleged wrongful killing of his intestate. At the conclusion of the evidence the court directed the jury to return a verdict for defendant. On that verdict the judgment was rendered, to reverse which this writ of error is prosecuted.

In Aurora, Ill., defendant had switchyards east and west of the river. On the west side the yard contained several

*See foot-notes appended to Illinois Terminal R. Co. v. Thompson (Ill.), 12 R. R. R. 683, 35 Am & Eng. R. Cas., N. S., 683.

tracks. One of these, known as the "house track," ran north and south. Next east of this was a freight house. Defendant had built and maintained the house at an angle of 30 degrees to the track, and in such a manner that the northwest corner of the roof projected to the middle of the track at a height of 15 feet 8 inches above the rails. Ordinary freight cars are 12 feet high and furniture cars 14. By showing this situation, and proving that decedent was killed by being struck by the projection while in the discharge of his duties as freight brakeman on a furniture car, plaintiff made a prima facie case. *Railroad Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; *Hough v. R. Co.*, 100 U. S. 213, 25 L. Ed. 612.

Thereupon defendant took the burden of establishing affirmatively and (to warrant a directed verdict) conclusively assumption of risk or contributory negligence.

Assumption of risk. The Supreme Court said in *Hough v. R. Co.*, supra:

"It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation. * * * But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk."

For the six months preceding the fatal injury decedent had been working for defendant as a yard brakeman. His usual place of employment was in the east yard. During those six months he had been sent on different days, estimated at 20 to 25, to take the place of some absentee in the switching crew in the west yard. On four successive days, including the day of the accident, he had been in the west yard. Before that he was not shown to have been there for 30 days. Cars were kicked in on the house track once or twice a day. Sometimes a brakeman rode the car in and set the brake to hold it; sometimes the brakeman ran along by the car and blocked the wheels with a stone or piece of wood. On the occasions when decedent was present in the west yard, sometimes he, sometimes the other brakeman, and sometimes the foreman, attended to the car that was kicked in on the house track. Decedent had ridden ordinary cars on the house track, but not furniture cars. The distance from the switch through which the cars were kicked in on the house track to the projecting corner of the roof was 74 feet, or about 2 car lengths. The track was upgrade from the switch to the freight house and beyond, so that the kicked car had to be held by brake or block at the desired place, or it would coast back to the switch.

From the above-quoted declaration of the Supreme Court in *Hough v. R. Co.* it is very clear that decedent, on entering the service, did not assume the danger from the roof corner that projected over the track as needlessly as a spike or bayonet. When, if ever, did he assume it?

The record contains no evidence that any one had informed him of the danger, no statement or admission that he knew of it, nothing that conclusively forces the inference that he was aware of the peril that cost him his life. Did the evidence wall in the jury with one inevitable conclusion, so that it was right for the court to tell them that the law charged decedent with knowledge of the danger and the assumption thereof? We think not. We are not now saying that it would be impossible for 12 reasonable men, under proper instructions from the court, to find as a fact that a prudent person, circumstanced as was decedent, would have known of the danger before undertaking the act, and would either have kept out or have gone ahead knowingly at his own risk. But, if any other finding was permissible under proper instructions, the case should have been submitted to the jury.

Decedent's regular work was not in the west yard. The things with which he regularly charged his mind in connection with his employment were in another locality. Prior to the four days ending with his death, he had not been in the west yard for a month. The house track was only one of several in the west yard. Once or twice a day a car or cars were kicked in on the house track. Seemingly the bulk of the work was on other tracks. Counting all the odd occasions (all but the last being a month before his injury), decedent had been in the west yard 20 to 25 times. The foreman and the other switchmen also attended to cars that were set in on the house track. How often did decedent? The evidence is indefinite as stated. One-third? That would be seven or eight times all told. Sometimes the brake was used; sometimes a block. How many times did decedent use the brake? The evidence does not distinguish. Half? Then three or four times. The distance from the switch to the roof projection was about two car lengths, and the track was upgrade. When the car was kicked hard enough to send it up the grade to the desired point beyond the roof projection, at what point along the track, on the three or four occasions decedent used the brake, did he begin mounting the car? The evidence fails to show. Even if he started to catch the stirrup and climb the ladder at the switch, the car may have traveled twice its length before he reached the top to pass to the brake wheel, and his attention, engrossed in the proper performance of his duties, may never have been called to the danger of being knocked from the top of a high car by the uselessly projecting corner of the roof. When he was at work on other tracks, giving and receiving signals, opening and closing switches, running to catch and stop, couple and

Hawley v. Chicago, etc., Ry. Co

uncouple, moving cars, were his opportunities such that a prudent person diligently engaged in the master's service should have learned of the danger? The freighthouse was there as a visible object, but from other tracks the perspective may not have informed him that the roof corner projected to the center of the house track. When he glanced from his work on other tracks towards the freighthouse, if he did, he may not have appreciated, unless a box car were passing under the roof corner at that instant, the relative height of the two. The knowledge, actual or constructive, that must have been brought home to decedent, was not knowledge that the freighthouse roof had corners, but knowledge of the danger from the possible relations between a roof corner that projected to the middle of the house track at a certain height, a car of a certain height moving at a certain speed under the roof corner, and a person on the top of the car in such a position as to be hit by the roof corner. A surveyor can now bring together the measurements that prove the danger was present. But decedent was not there as a surveyor. Actual knowledge was not proven. On this record we think defendant failed to discharge the burden of establishing conclusively a state of facts on which the law will charge decedent with having assumed the risk. Compare *Railroad Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; *Railroad Co. v. Swearingen*, 122 Fed. 196, 59 C. C. A. 31; *Swift v. O'Neill*, 187 Ill. 337, 58 N. E. 416.

Plaintiff further contends (citing *Dorsey v. Construction Co.*, 42 Wis. 583, and *Shearman & Redfield on Negligence* [4th Ed.] § 198) that the projecting roof corner in its relations to track and cars constituted such a deathtrap that neither constructive nor actual knowledge of the danger at some time before the injury would establish assumption of risk, that in law a servant is not bound to keep his memory constantly charged with the location and relations of such obstacles, and that his engrossment in his duties at the time of the injury might excuse his failure to recall the impending peril; but we deem it unnecessary to formulate any opinion thereon at this time.

Contributory negligence. On the occasion of his injury decedent, according to one witness, climbed to the top of the car, ran directly towards the roof corner, dodged in front of it, stooped as if to avoid it, and was struck; according to others, he mounted the ladder before the car reached the roof point, ran to the brake with his back towards the projection, stooped to seize the brake wheel, and was struck. The quality of decedent's conduct at the time (and this might take some color from the inferences as to his constructive knowledge) being in dispute, the question of contributory negligence should have been submitted to the jury.

Judgment reversed; new trial ordered.

FEARNS *v.* NEW YORK CENT. & H. R. R. CO.

(Supreme Judicial Court of Massachusetts, Worcester, Oct. 18, 1904.)

[72 N. E. Rep. 68.]

Brakeman—Assumption of Risk—Structures Near Track.*

Since a railway brakeman assumes all the ordinary risks of the business, the railway company owes him no duty with reference to structures erected for a proper purpose at a reasonable distance from the track, except to see that they do not expose him to unnecessary danger by being left in an unsafe or improper condition.

Same—Same—Same—Defects.*

Crossing gates erected by the side of a railway track had become out of repair, so that the ends of the two gates were not opposite in the same line when lowered. Plaintiff, a brakeman, while running by the side of an engine in the evening in the line of his duty, passed by the side of one of the gates and collided with the end of the other, which projected into his line of travel, and was injured: *held*, that plaintiff did not assume the risk of such injury as a matter of law.

Same—Same—Contributory Negligence.

Where a brakeman was injured in the evening by running into a crossing gate which was out of repair and projected into his line of travel as he was running along the side of an engine in the line of his duty, he was not guilty of contributory negligence as a matter of law.

Report from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by Cornelius E. Fearn against the New York Central & Hudson River Railroad Company. A verdict was rendered in favor of plaintiff, and the case reported to the Supreme Judicial Court. Judgment on verdict.

Alfred S. Hayes and Wm. S. Baugs, for plaintiff.

Ralph A. Stewart, for defendant.

KNOWLTON, C. J. The plaintiff, when he entered the service of the defendant as a brakeman, impliedly assumed all the ordinary risks of the business, which included the risk of injury from permanent structures erected for proper purposes at reasonable distances from the tracks, whether then in existence or erected afterwards. In reference to the existence of such structures, his employer owed him no duty other than to see that they did not expose him to unnecessary danger by reason of their being left in an unsafe or improper condition. If the gates had been properly constructed and in good repair, their existence near the track, at the distance shown by the testimony, would have been no evidence of negligence on the part of the defendant. *Thain v. Old Colony R. R. Co.*, 161 Mass. 353, 37 N. E. 309. But they were improperly constructed, or out of repair, so that the ends of the two gates erected upon opposite sides of the street were not opposite to each other in the same line, as they should have been, when they were lowered, but one

*See foot-note appended to *Illinois Terminal R. Co. v. Thompson* (Ill.), 12 R. R. R. 683, 35 Am. & Eng. R. Cas., N. S., 683.

Rodefer v. Pittsburg, etc., R. Co

turned to one side and the other to the other, so as to leave an opening between them through which a man could pass. The plaintiff, while running by the side of the engine in the evening to get a car ready for coupling, passed along by the side of one of the gates and collided with the end of the other, which projected out into his line of travel, and he was thereby thrown under the engine and injured.

There was evidence that this was an improper and defective condition of the gates, and that repairs had been made previously in an attempt to improve them. The plaintiff's implied contract, when he entered the defendant's service, did not cover the risk from this defective condition of the gates, if it then existed; for the condition was not so open and obvious that a brakeman, on entering the service, would be supposed to know of it, or to discover it if he undertook to ascertain the conditions under which he was to work. The evidence tends to show that it was an unusual and unexpected condition, which it was the duty of the defendant to improve. In this particular the case is not like *Lovejoy v. Boston & Lowell R. R. Co.*, 125 Mass. 79, 28 Am. Rep. 206; *Thain v. Old Colony R. R. Co.*, 161 Mass. 353, 37 N. E. 309; *Bell v. N. Y., N. H. & H. R. R. Co.*, 168 Mass. 443, 47 N. E. 118; and *Ryan v. New York, New Haven & Hartford R. R. Co.*, 169 Mass. 267, 47 N. E. 877. We are therefore of opinion that there was evidence of negligence on the part of the defendant, and that it could not be ruled as a matter of law that the plaintiff assumed the risk of the gates as they were at the time of the accident.

We are also of opinion that the question whether the plaintiff was in the exercise of due care was properly left to the jury. He was in the performance of his duty, and if the end of the gate which obstructed him had been in a line with the opposite gate, he would not have been hurt. So far as appears, he did not know that the end of this gate projected out from the line of the other into the line of travel. *Thyng v. Fitchburg R. R. Co.*, 156 Mass. 13, 30 N. E. 169, 32 Am. St. Rep. 425; *Garant v. Cashman*, 183 Mass. 13, 66 N. E. 599.

Judgment on the verdict.

RODEFER et al. v. PITTSBURG, O. V. & C. R. CO.

(Supreme Court of Ohio, April 11, 1905.)

[74 N. E. Rep. 183.]

Revocable License—Operation of Railroad Siding.*

A siding or switch constructed by a railroad company from its road to a manufactory at the expense and over the land of the latter, solely

*For the authorities in this series on the subject of contracts to build, maintain, and operate spur tracks or sidings, see *Schneider v. Knickerbocker Ice Co. (Wis.)*, 8 R. R. R. 880, 31 Am. & Eng. R. Cas., N. S., 880 (landowner had no right to maintain extension of tracks over private

Rodefer v. Pittsburg, etc., R. Co

for its benefit, and for the sole purpose of affording it facilities for receiving and shipping freight, and under a written agreement silent as to the length of time it is to remain, may not be maintained by the railroad company against the objection of the owner of the manufactory; the agreement, so far as the right of the railroad company is concerned, being merely a license revocable at the option of the licensor or his grantee.

(Syllabus by the court.)

Error to Circuit Court, Belmont County.

Action by the Pittsburg, Ohio Valley & Cincinnati Railroad Company against T. A. Rodefer and others. Judgment for plaintiff, and defendants bring error. Reversed.

On the 15th day of January, 1883, the Bellaire Window Glass Works, the Bellaire Goblet Company, and Rodefer Bros., entered into the following contract with the Ohio Valley Railway Company:

"Memorandum of agreement entered into this fifteenth day of May, 1883, by and between the Bellaire Window Glass Works, the Bellaire Goblet Company and Rodefer Brothers, of the first part, and the Ohio Valley Railway Company, of the second part, in relation to the contract for a railroad from a connection with the Cleveland & Pittsburgh Railroad Company through South Bellaire, as follows:

"For the consideration hereinafter mentioned, said parties of the first part agree to pay to said Ohio Valley Railway Company the following sums, to wit: The said Bellaire Window Glass Works the sum of \$2,000; Rodefer Brothers, \$1,250; \$250 of the sums subscribed by Rodefer Brothers shall not be payable for six months after the time fixed for payment of the other amounts, said sums to be paid on the condition that the railway company shall on or before the first day of December next, and before any standard gauge track shall be constructed between the points hereinafter named, construct its own road from the point of connection with the Baltimore & Ohio Railroad track, on the property of the Bellaire, Zanesville & Cincinnati Railway Company to a point near the Belmont Coalworks in South Bellaire. Said sums to be paid within thirty days from the time said track is ready for use between said points.

"It is further agreed that said railway company shall construct a siding or switch from a point in the main track on

lands); *Texarkana & Ft. S. Ry. Co. v. Texas & N. O. R. Co.* (Tex.), 4 R. R. R. 631, 27 Am. & Eng. R. Cas., N. S., 631 (where lumber company and a railroad constructed a spur track from the former's premises to the latter's line, the lumber company had no right to authorized use of spur by another railroad); *Missouri, K. & T. Ry. Co. of Texas v. Carter* (Tex.), 3 R. R. R. 538, 26 Am. & Eng. R. Cas., N. S., 538 (validity of contract to maintain side track for convenience of sawmill owner; and liability of consolidated company under the contract); note, 6 Am. & Eng. R. Cas., N. S., 714 (verbal contract to maintain switch for benefit of shipper); *Warner v. Texas & P. R. Co.* (U. S.), 6 Am. & Eng. R. Cas., N. S., 696 (verbal contract by railroad to maintain switch for benefit of shipper).

Rodefer v. Pittsburg, etc., R. Co

the lands of Jacob Heatherington into and through Union street in South Bellaire to the north line of the lands of the Bellaire Window Glass Works, and also a siding on the lands of Rodefer Brothers, at their glass works. Said parties of the second part to provide the necessary right of way for the said first mentioned sidings or switches, and the same to be constructed on or before the first day of December, 1883, or as soon thereafter as said right of way can be provided by said parties of the second part. Said Rodefer Brothers are to furnish the right of way for last named siding.

"It is further agreed that no transfer charges shall be made on business passing between the Ohio Valley Railway Company and the Cleveland & Pittsburgh Railroad Company in or out.

"It is further agreed that until connection shall be made with the Cleveland & Pittsburgh Railroad said Ohio Valley Railway Company shall receive from and deliver to any other standard gauge railroad company connecting therewith at Bellaire, all loaded and empty cars at a charge not to exceed \$2.00 a car for loaded cars and no charge for empty cars. And if said railway company shall fail to furnish the motive power to handle said cars, said parties of the first part may employ the motive power of any other railroad company to do said work at customary rates, at the cost of the Ohio Valley Railway Company, and shall have the use of its tracks for said work and pay said Ohio Valley Railway Company therefor the rates above specified.

"It is further agreed that if the Baltimore & Ohio Railroad refuses to connect with said Ohio Valley Railway Company at the northern boundary of the property of the Bellaire, Zanesville & Cincinnati Railway Company, and the Ohio Valley Railway Company shall fail to furnish the motive power to furnish said power as aforesaid, then said parties of the first part shall have the said connection laid and use said track on the terms above specified until said Ohio Valley Railway Company shall make connection with the Cleveland & Pittsburgh Railroad Company.

"It is further agreed that all the conditions of this agreement applying to the Ohio Valley Railway Company shall apply to any lessee or successor of said Ohio Valley Railway Company.

"It is further agreed that said parties of the first part or either of them, shall be entitled to receive stock of said Ohio Valley Railway Company at par for the amount paid by them respectively, if they or either of them so elect at the time of making said payments.

"And it is further agreed that if said tracks shall not be constructed within the time above specified and on the conditions aforesaid, then this agreement shall be void."

The contract was duly signed by the parties, and thereafter they extended the time for performance to February

1, 1885, prior to which time the road, swiches, and sidings were constructed, and the money paid. At that time the plaintiff in error Thornton A. Rodefer and his brother Albert comprised the firm of Rodefer Bros., and owned and operated a glass factory on a tract of land owned by them abutting on the east the right of way of the Bellaire, Zanesville & Cincinnati Railway Company, a narrow gauge railway, and on the south Twenty-First street, in the city of Bellaire. At the time of the commencement of this action Thornton A. Rodefer had succeeded to the rights of said partners, and was the sole owner of the factory and real estate, and the defendant in error was the successor of the Ohio Valley Railway Company, and had succeeded to all of its rights and had assumed all of its obligations under said contract. In addition to the foregoing the circuit court found the following facts:

"(8) That in constructing the siding mentioned in said contract in front of the glasshouse property belonging to Rodefer Bros., as provided in the agreement aforesaid, said siding left the main line of said Ohio Valley Railway at a point south of the lands of said Rodefer Bros. and of said Twenty-First street, and crossed the tracks of said Bellaire, Zanesville & Cincinnati Railway, and thence in a northerly direction by an overhead structure across said Twenty-First street onto the lands of said Rodefer Bros., and thence along and over the lands of said Rodefer Bros., in front of their glass factory as the same was then located, and said track and siding were located and constructed by the mutual consent and assent of said railway company and said Rodefer Bros.

"(9) That afterwards, about the year 1892, said glass factory was entirely consumed by fire, and about the year 1893 it was rebuilt by said Rodefer Bros.; the new building being about twice as large as the old; the size of the same being increased by extending the same south of where the old building stood; and the east side of said building was about twenty-one feet west of the east side of the old building.

"(10) That after the new building was constructed said railway company moved its siding, by the consent of said Rodefer Bros., about twenty-one feet west of its original location, so as to accommodate itself to the business of said Rodefer Bros. in receiving and discharging freight to the said new glass factory.

"(11) That after the construction of said railway and the siding aforesaid the Baltimore & Ohio Railroad Company, which is a common carrier, owning and operating a road for the carrying of freight and passengers, by agreement with the Bellaire, Zanesville & Cincinnati Railway Company, laid a third rail west of the west rail of said Bellaire, Zanesville & Cincinnati Railway Company's main line, to enable it, by using the east rail of said Bellaire, Zanesville & Cincinnati railway Company and the said third rail, to run

Rodefer v. Pittsburg, etc., R. Co

standard-gauge cars over the same; that said third rail and the east rail of said Bellaire, Zanesville & Cincinnati Railway was and is used by said Baltimore & Ohio Railroad for switching cars to various manufacturing plants located in Southern Bellaire.

“(12) That said defendant, Thornton A. Rodefer was, about and before the time the rails and tracks mentioned in the petition were torn up and removed, contemplating the erection of an extension to his glass factory, by which it was proposed to extend the same in a southerly direction, in a line with the factory building theretofore constructed, about ninety feet. The southeast corner of said property extension was to extend to a point forty-one feet from the north side of said Twenty-First street. That the said defendant Rodefer had adopted plans and specifications, and had called on contractors, and had made contracts for work and material for the erection of said extension. This addition or extension, if placed upon the premises where said Rodefer contemplated putting it, and if placed in line with the east front of the old building, would require the removal of a part of the siding aforesaid, of said Ohio Valley Railway Company, at the southeast corner of said contemplated extension or addition, and if completed as contemplated as aforesaid, would occupy about four feet of the ground at the southeast corner of said contemplated building, which was then occupied by said siding, and would be placed directly on the track of said siding as then located.

“(13) That some considerable time after defendant Rodefer had contracted for the erection of said extension or addition to his said glass factory, he gave notice to the said plaintiff to remove the part of its track that would interfere with the erection of said building as contemplated and contracted for, so as not to interfere with the construction of said addition. And said plaintiff failing to remove its track eastwardly as requested, said defendant Rodefer tore up that part of said siding which extended from the north side of said Twenty-First street to a point ninety-seven feet north of the same, and procured the Baltimore & Ohio Railroad Company to build a switch over the same ground a little east of plaintiff's said switch. That at the time the temporary injunction herein was granted, said Rodefer, by his contractor, had completed about four-fifths of the stone foundation for said addition and extension.

“(14) That some years prior to the commencement of this suit said Ohio Valley Railway Company had constructed a spur track commencing on said siding where the same crosses the south side of said Twenty-First street, and extending in a southerly direction west of the Bellaire, Zanesville & Cincinnati Railway Company's main-line track and said third rail of said Baltimore & Ohio Railroad in front of the Bellaire Stove Company's factory; that said

spur was constructed for the purpose of enabling said Ohio Valley Railway Company and its successors to receive and discharge freight from the factory of said Bellaire Stove Company, and, in so receiving and discharging the same, it was necessary to run cars onto the siding heretofore mentioned, and then back said cars out onto said spur.

"(15) That the southeast corner of the foundation of the proposed extension or addition is twelve feet and nine inches from the third rail of the Bellaire, Zanesville & Cincinnati Railway, and, if the siding of plaintiff company was built in this space of twelve feet and nine inches, there would not be clearance room if standard-gauge cars were moving on the Bellaire, Zanesville & Cincinnati third rail and plaintiff's said switch (i. e., they could not pass each other at the same time); that this want of clearance would extend for about twenty-four feet north of the southeast corner of said extension; that at the point named, both south and north of the same, there is a clear view for several hundred yards, so that switching trains, if using the siding, and trains of cars using the Bellaire, Zanesville & Cincinnati Railway for switching purposes, would have full view of any approaching trains or locomotives.

"(16) That Rodefer Bros. or defendant Thornton A. Rodefer never conveyed to said Ohio Valley Railway Company, nor to the plaintiff, by deed, contract, or any paper writing, any right of way for a siding over their or his premises, except as hereinbefore stated and found."

The action was commenced in the court of common pleas of Belmont County in November, 1900, by the railroad company against the plaintiffs in error, to prevent them from further removing the siding, and to require them to restore so much as had been already removed. The facts connecting the defendant McClain with the subject of the litigation do not appear, but presumably he was the contractor for Rodefer. The court of common pleas found for the defendants, and dismissed the petition. The railway company appealed. The circuit court found the facts as above, and granted the relief prayed for. The defendants prosecuted error in this court; their contention being that, upon the facts found, the judgment should have been in their favor.

Driggs & Heilein and James C. Tallman, for plaintiffs in error.

Carey & Mullins and C. L. Weems, for defendant in error.

SUMMERS, J. (after stating the facts). Plaintiff in error contends that the right given by the contract to the railway company to construct a siding on his land was merely a license revocable at any time, or when it ceased to be useful to the owner of the land. The railway company contends that the intention of the parties to the contract was, of Rodefer's predecessor in title, to secure facilities for sending

and receiving freight at its factory, and of the railway company, to carry the freight; that the siding still may be used to effect that intention, and that so long as it may be so used the right to maintain it subsists; that such a right may be created by contract; and that, if the right is merely a license, then it has been executed, and is irrevocable.

In *Wolfe v. Frost*, 4 Sanf. Ch. 72, the assistant vice chancellor defines an easement and a "license" as follows: "An easement is a privilege, without profit, which the owner of one neighboring tenement has of another, in respect of their several tenements, by prescription or by grant, by which the servient owner is obliged to suffer or not to do something on his own land for the advantage of the dominant owner. A license is an authority to do a particular act or series of acts upon another's land, without possessing any estate therein. A license, when executed, will prevent the owner of the land from maintaining case or trespass for the acts done under it; but it is revocable at pleasure, and will not be a defense to any act done after it is revoked." In *The Greenwood Lake & P. J. Railroad Co. v. N. Y. & G. L. Railroad Co.*, 134 N. Y. 435, 439, 31 N. E. 874, 875, Vann, J., defines them as follows: "An easement is a right, without profit, created by grant or prescription, which the owner of one estate may exercise in or over the estate of another for the benefit of the former. A license is a personal, revocable, and nonassignable privilege, conferred either by writing or parol, to do one or more acts upon land, without possessing any interest therein." Similar definitions may be found in the text-books.

That a right such as is claimed by the railway company to maintain and use in perpetuity a siding for its benefit on the land of the defendant is an easement, and not a license, is, we think, apparent from a study of the cases, and that a failure to discriminate between them has occasioned much of the confusion that exists upon the question of the revocability of a license. The right indefinitely to maintain and use its track upon the land of the defendant would be in effect, an appropriation of it to plaintiff's use. It would be permanent in its nature, and an interest in the land. *Junction Railroad Co. v. Ruggles*, 7 Ohio St. 1. In *Cook v. Stearns*, 11 Mass. 533, 538, a right to enter on the land of another to repair a dam was claimed under a license given by a former owner to build the dam. Chief Justice Parker, speaking of what is technically a license, and of licenses which in their nature amount to the creating of an easement, says: "The distinction is obvious. Licenses to do a particular act do not in any degree trench upon the policy of the law, which requires that bargains respecting the title or interest in real estate shall be by deed or in writing. They amount to nothing more than an excuse for the act, which would otherwise be a trespass. But a permanent right to hold

another's land for a particular purpose, and to enter upon it at all times without his consent, is an important interest, which ought not to pass without writing, and is the very object provided for by our statute. If the defendant had a license from the former owners of the plaintiff's close to make the bank, dam, and canal in their land, this extended only to the act done, so as to save him from their action of trespass for that particular act; but it did not carry with it an authority at any future time to enter upon the land. As to so much of the license as was not executed, it was countermandable; and transferring the land to another, or even leasing it, without any preservation, would of itself be a countermand of the license. For although, when one is permitted to do certain things upon the land of another, an implied authority is given to enter upon the land to do the thing, and to repair it, if it is of a permanent nature, yet the first permission or license must be by grant, in order to draw after it this consequence."

Permission to cross another's land or to enter upon it, and to cut a tree, or to do some other act, is very different in its consequences from those arising from the execution of a permission to appropriate part of the land, or to erect upon it a permanent fixture. And to call permission to do the latter a license, and then to say that when executed it is irrevocable, because a license executed is irrevocable, is not only to overlook the distinction between an easement and a license, but also, in a measure, to defeat the object of the statute of frauds and of our laws respecting the conveyance of land. A license may be revoked at any time. What is meant by the statement that a license executed is irrevocable is not that the license may not be revoked as to future acts, but that the licensor may not recover against the licensee for the acts already done. It is contended that the rule is otherwise in this state, and *Wilson v. Chalfant*, 15 Ohio, 248, 45 Am. Dec. 574, *Hornback v. Cincinnati & Zanesville Railroad Co.*, 22 Ohio St. 81, and *Meek v. Breckenridge*, 29 Ohio St. 642, are cited. The earlier cases were decided when land was cheap, water power a necessity, and the policy of the state to encourage manufacturing. The rule contended for does not seem to have been applied in the later case of *Wilkins v. Irvine*, 33 Ohio St. 138. In *Jones on Easements*, § 69, the author says: "Although there are numerous decisions which hold that in equity a permanent license becomes irrevocable after the licensee has expended money on the faith of it, these decisions seem opposed to sound law and to the weight of authority both in America and in England." In *Crosdale v. Lanigan*, 129 N. Y. 604, 610, 29 N. E. 824, 825, 26 Am. St. Rep. 551, *Andrews, J.*, says: "There has been much contrariety of decision in the courts of different states and jurisdictions. But the courts of this state have upheld with great steadiness the general rule that a parol

license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is nevertheless revocable at the option of the licensor; and this although the intention was to confer a continuing right, and money had been expended by the licensee upon the faith of the license. This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of lands with restrictions founded upon oral agreements, easily misunderstood. It gives security and certainty to titles which are most important to be observed against defects and qualifications not founded upon solemn instruments. The jurisdiction of courts to enforce oral contracts for the sale of land is clearly defined and well understood, and is indisputable; but to change what commenced in a license into an irrevocable right, on the ground of equitable estoppel is another and quite different matter. It is far better, we think, that the law requiring interests in land to be evidenced by deed should be observed, than to leave it to the chancellor to construe an executed license as a grant, depending upon what, in his view, may be equity in the special case." In *White v. Manhattan Railroad Co.*, 139 N. Y. 19, 34 N. E. 887, the Court of Appeals ruled that: "It seems that an easement to do some act of a permanent nature upon the lands of another cannot be created by a license, even when in writing and executed upon a good consideration. It can only be created by deed, or conveyance operating as a grant." In *Jackson & Sharp Co. v. Phila., W. & B. Railroad Co.*, 4 Del. Ch. 180, it is held that: "It is settled that at law a license cannot create or transfer any interest in land. Hence a mere license affecting land is, at law, always revocable, though granted for a valuable consideration, and though the licensee may have expended money on the faith of it. This rule is modified in equity by the principle of equitable estoppel, but equitable estoppel proceeds always on the basis of preventing fraud. Its effect is to restrain the exercise of a legal right, and this even a court of equity cannot do unless there has been such conduct as would render the assertion of the legal right a fraud. The erection of a side track connecting with a railroad, at the expense of plaintiff, and the subsequent expenditure of large sums of money by it in the erection of carworks, from which cars were delivered by means of the side track, held not to estop the railroad company from revoking their license to connect the side track with the company's track." However, the matter need not be further pursued, since the case at bar is disposed of on other grounds, presently to be stated; and what has been here said is not to be considered as in any way modifying the rule laid down in previous decisions of this court, but is intended merely as a caution against a blind application of a rule.

That the railway company has no right to maintain and

Rodefer v. Pittsburg, etc., R. Co

use the siding without permission of the owner of the land must be concluded from the considerations following. The agreement does not purport to grant any interest in the land. An interest in the land was not necessary to the accomplishment of the object of the agreement, and there is nothing in the agreement, or in the circumstances surrounding the parties at the time they entered into it, from which may be inferred an intention to grant such an interest. The railway company did not pay for the privilege of putting in a siding for its benefit. It received pay for constructing the siding on the owner's land, and for the owner's sole benefit. No right to use it otherwise is provided for in the agreement, nor is it provided that the owner shall ship on plaintiff's road. The contract is with Rodefer Bros. The defendant is not privy to it and not bound by it, and, if he does not choose to use the siding for shipping or receiving freight, what possible benefit could the plaintiff derive from maintaining it? The sole object of the agreement, so far as relates to the siding, was to secure an accommodation from the railway company for the owner of the land; not to grant to the railway company a privilege in the owner's land. The siding being on the land of the defendant, and solely for his benefit, he may terminate the right to maintain it, and may require its removal. The following observations of defendant's counsel seem pertinent: "This is an important question. Hundreds of manufacturing plants have paid railroad companies for building switches on their premises, leading to their factories, which were designed and intended for their accommodation only; and if it is the law that, when the railroad company builds the switch, its interest in the ground on which the switch is built is superior to that of the owners to extend or remodel their factories; that the railroad company, by so doing, acquires a permanent easement in or interest in the grounds on which the switch is located, that is superior to all rights of the owners—then it is high time that the manufacturing plants were finding it out."

The judgment of the circuit court is reversed, and upon the facts found, judgment is rendered for the plaintiffs in error, and the petition is dismissed.

Reversed, and judgment for plaintiffs in error.

DAVIS, C. J., and PRICE and SPEAR, JJ., concur

PEOPLE ex rel. ROCHE v. ILLINOIS CENT. R. CO.

(Supreme Court of Illinois, April 17, 1905.)

[74 N. E. Rep. 116.]

Taxation—Railroads—Track—Assessment.*

A bridge approach, consisting of elevated tracks, embankment and viaduct, constructed on land purchased by a railroad for a right of way, and used exclusively as a railroad track, for railroad purposes—to connect the main tracks of the railroad with a bridge across a navigable river—constitutes a railroad track, within the meaning of the provisions of the revenue law of 1872 (Hurd's Rev. St. 1903, c. 120, §§ 40-52, 109) dividing real estate belonging to railroad companies into two classes for the purposes of taxation, the first consisting of railroad track, in which is included the right of way, and superstructure of main, side, or second track, and turn-outs, and requiring the first class to be assessed by the State Board of Equalization, and not by the county assessor.

Appeal from Alexander County Court; Wm. S. Dewey, Judge.

Application by the people, on the relation of James C. Roche, for judgment for delinquent taxes against the Illinois Central Railroad Company. From a judgment in favor of the railroad, relator appeals. Affirmed.

This is an application of the county collector of Alexander county, to the June term, 1904, of the county court of that county, for a judgment against lands, lots, and other real estate for taxes due thereon for the year 1903. In the collector's list of delinquent property was the bridge approach of the Illinois Central Railroad Company to the railroad bridge across the Ohio river at Cairo, in said county. Said approach was assessed by the county assessor at \$250,000, and the taxes were extended upon the taxable assessment or valuation of \$50,000, amounting to the sum of \$3,542.40. The taxes thus amounting to \$3,542.40 were assessed against "the Illinois Central bridge approach," described on the taxbooks and in the collector's application as follows: "The Illinois Central bridge approach, consisting of 2,656 lineal feet of steel viaduct and 5,307 lineal feet of trestle, 3,255 feet of which is composed of frame bents and the balance of pile bents. The pile trestles are filled in with ground. The

*For the authority in this series on the subject of what is, and is not, taxable as part of railroad company's right of way, roadbed, or tracks, see *Chicago & N. W. Ry. Co. v. People (Ill.)*, 1 R. R. R. 458, 24 Am. & Eng. R. Cas., N. S., 458 (stockpens not part of track); note, 11 Am. & Eng. R. Cas., N. S., 190; *Territory of New Mexico v. United States Trust Co. of New York (U. S.)*, 14 Am. & Eng. R. Cas., N. S., 811 (what included in "right of way"); *City of Detroit v. Donovan (Mich.)*, 23 Am. & Eng. R. Cas., N. S., 520 (franchise of street railway as part of roadbed, and therefore personal property); *Mayor, etc., of City of Newark v. State Board (N. J.)*, 23 Am. & Eng. R. Cas., N. S., 308; *Nashville & D. R. Co. v. State (Ala.)*, 23 Am. & Eng. R. Cas., N. S., 202 (what included in right of way); *Chicago, M. & St. P. Ry. Co. v. Cass County (N. Dak.)*, 11 Am. & Eng. R. Cas., N. S., 813 (what is subject to taxation as "roadway.")

People ex rel. Roche v. Illinois Cent. R. Co

above said Illinois Central bridge approach is located in sections 14 and 23, in township 17, range 1 west of the third principal meridian in the county of Alexander." Appellee filed six objections to the tax so assessed upon its property, the first of which was not passed upon by the county court, and the fifth and sixth of which were overruled, and the second, third, and fourth of which were sustained. Judgment was rendered against the collector and in favor of the appellee, and from such judgment the present appeal is prosecuted.

Lansden & Leek and Alexander Wilson, State's Atty., for appellant.

W. W. Barr and Gilbert & Gilbert (J. M. Dickinson, of counsel), for appellee.

MAGRUDER, J. (after stating the facts). The six objections filed by appellee in the county court may be reduced to three: First, that the bridge approach is exempt from taxation under appellee's charter; second, that said bridge approach, if assessed at all, should be assessed by the State Board of Equalization, and not by the county assessor; and, third, that the description of the approach is not sufficient to justify or sustain the assessment. We deem it necessary to consider only the second of these objections in order to dispose of the present appeal.

In consideration of the construction of appellee's road, and the payment by it of 7 per cent. of the gross amount of its receipts or income to the state, appellee has been relieved from payment of all other than state taxes, to be assessed as provided for in section 22 of its charter. Charter of Illinois Central Railroad Co. of February 10, 1851, as found in Priv. Laws Ill. 1851, p. 61; *Neustadt v. Illinois Central Railroad Co.*, 31 Ill. 484. The first objection made by appellee in the court below raised the question whether this bridge approach was exempt from taxation under the provision of appellee's charter, as above referred to. This objection, however, was not passed upon by the county court. Counsel for appellant say in their brief: "That court declined to pass upon or consider the question of the exemption of the bridge approach from taxation, but held that, if subject to assessment and taxation, it must be assessed by the state board." Counsel for appellee say in regard to this objection in their brief: "The county court * * * made no ruling on it, * * * and we doubt not this honorable court will not find it necessary to devote its valuable time to a decision of a question so unnecessary to a decision of this case, as viewed by the lower court and counsel for appellee." It being thus conceded by counsel on both sides that the objection in relation to the exemption of the property in question from taxation under appellee's charter was not passed upon by the trial court, the validity or invalidity of such objection will not be here discussed.

The bridge approach in question was assessed by the county assessor, and not by the State Board of Equalization; and, if the county assessor had no power to make the assessment against the bridge approach, such assessment is void. If that assessment, as made by the local assessor, was made by an unauthorized person, then the action of the court below in rendering judgment in favor of the appellee was correct, independently of the question whether the property was or was not exempt from taxation by any official or board. The only question, therefore, to be determined, is whether the property in controversy was properly assessed by the local or county assessor. The determination of the question thus presented depends upon the determination of the further question whether or not "the Illinois Central bridge approach," so assessed, is railroad track. If the bridge approach comes within the designation of "railroad track," it could only be assessed by the State Board of Equalization, if assessed at all, and not by the county assessor. The inquiry therefore arises whether or not the railroad property in question is "railroad track." Two deeds were introduced in evidence—one dated October 15, 1853, executed by Taylor and Davis, trustees of the Cairo city property, to the Illinois Central Railroad Company, covering a strip of land 200 feet wide (containing 139.93 acres), extending from a point in Pulaski county down to a point in said section 23 in Alexander county, and also conveying another tract, of 70.56 acres, extending from the Mississippi river to the Ohio river; said strip of land connecting with the said last-named tract on the north near the center. The other deed is dated April 8, 1889, executed by Taylor and Parsons, trustees of the Cairo trust property, to the Illinois Central Railroad Company, conveying 17.60 acres of land. A plat was introduced in evidence, showing the location of the company's lands described in these two deeds. The plat shows an embankment along the approach and the foot of the slope of the embankment. Upon this embankment is a 40-foot roadbed, and the remainder of the approach is known as the "Steel Viaduct." The plat so introduced represents the original right of way obtained by the deeds, and the entire land owned by the company. The top of the embankment, where it connects with the steel viaduct, is shown; and it is all a part of the appellee's right of way. There are two tracks on the embankment, and one track on the steel viaduct connected with the embankment. The entire length of the embankment is 5,307 feet, and of the steel viaduct 2,656 feet. One of the witnesses, who is a civil engineer, says: "The entire embankment and viaduct are on the Central's right of way. * * * A little more than one-half of the embankment is on the land acquired in 1853, and a little less than one-half is on the land acquired in 1889. * * * The entire right of way is literally covered with

side tracks. There is no room for more without buying additional right of way. There are two tracks on the earth embankment—one to and the other from the bridge, and one track on the steel viaduct." Another witness testified: "The approach leads from the Central's main line to the bridge. * * * The land described in the deed of October 15, 1853, * * * was purchased for right of way to be used for main and side tracks and other improvements necessary to the operation of the railroad, and has been used for such purposes ever since. The land in deed of April 8, 1889, * * * was purchased for additional right of way, and to enable the company to construct the Illinois approach to the bridge. * * * Since the purchase of these lands the Central has had the control and occupancy of them. This additional right of way is occupied by the company's tracks and so used. * * * Previous to the construction of the bridge we had an incline here, but it was not able to do the increased business growing up on the Illinois line. In order to operate that business satisfactorily from the Illinois lines, the bridge approach was absolutely indispensable. It was necessary to the successful and profitable operation of these lines through Illinois."

The evidence thus shows quite clearly that the elevated embankment, and steel viaduct connected therewith, which constitute the bridge approach in question, are a part of appellee's right of way, and come within the meaning of what is designated in the statute and decisions of this court as "railroad track." The revenue law of 1872 (Hurd's Rev. St. 1903, c. 120, §§ 40-52, 109) divides, for the purpose of assessment for taxation, all real estate belonging to railroad companies into two classes, namely, "railroad track," and "all real estate, including the stations and other buildings and structures thereon, other than that denominated 'railroad track,'" and provides that the first class shall be assessed by the State Board of Equalization. Section 41 of the revenue act requires the railroad companies to return to the county clerk a statement or schedule showing the property held for right of way, and section 42 then provides as follows: "Such right of way, including the superstructures of main, side or second track and turn-outs, and the station and improvements of the railroad company on such right of way, shall be held to be real estate for the purposes of taxation, and denominated 'railroad track,' and shall be so listed and valued; and shall be described in the assessment thereof as a strip of land extending on each side of such railroad track, and embracing the same, together with all the stations and improvements thereon," etc. *Chicago & Alton Railroad Co. v. People*, 98 Ill. 350. The proof in the case at bar shows that the tracks upon the embankment and viaduct above mentioned were erected by appellee upon its right of way, and that appellee, which is a railroad company, did at the time of

People ex rel. Roche v. Illinois Cent. R. Co

the assessment own and use said tracks as its right of way for the operation of its lines in Illinois. These elevated tracks, and the embankment and viaduct upon which they are located, are certainly "a superstructure of main, side or second track," and therefore fall within the designation of "railroad track." In *Chicago & Alton Railroad Co. v. People*, supra, this court held that under the revenue law the exclusive power to assess "railroad track" and rolling stock of railway companies is conferred upon the State Board of Equalization, and therefore an assessment of property, used as railroad track, by the local township assessor, is void; and it was there held that land held and in actual use by a railroad company for side tracks, switches, and turn-outs must be regarded, within the meaning of the revenue law, as a part of the right of way of the company, notwithstanding it may have machine shops, depots, roundhouses, and other superstructures thereon, necessary for the successful use of the road.

The bridge approach here under consideration comes none the less under the designation of "railroad track," because the tracks are elevated. In *Kotz v. Illinois Central Railroad Co.*, 188 Ill. 578, 59 N. E. 240, where the elevation of its tracks by the appellee was under consideration, this court said (page 581 of 188 Ill., page 240 of 59 N. E.): "The right of appellee to use its right of way 'for all uses and purposes connected with the construction, repair, maintenance and complete operation of said railroad' was not exhausted so soon as a surface road was built thereon, but is a continuing right, which will enable appellee to change its plan of construction and operation to meet the demands upon it of a growing business, and the changes wrought by the development of society."

It is true, also, that the embankment and viaduct in question, and the tracks thereon, lead from the main tracks of appellee to a bridge across the Ohio river, but they are none the less within the meaning of "railroad tracks" on this account. In *Chicago & Alton Railroad Co. v. People*, 129 Ill. 571, 22 N. E. 864, 25 N. E. 5, it was held that a side track of a railroad company, leading from the main track to a stone quarry, and used for the purpose of procuring stone for ballasting the road, must be regarded as "railroad track," for the purpose of taxation. In *Anderson v. Chicago, Burlington & Quincy Railroad Co.*, 117 Ill. 26, 7 N. E. 129, it was held that a bridge across a navigable stream, forming the boundary line between this and another state, constructed and used exclusively by railroad company as a part of its continuous line of railroad, comes within the denomination of "railroad track" for the purposes of taxation, and, as such, must be assessed only by the State Board of Equalization; and its assessment by the local assessor was there held to be without warrant of law. If a bridge constructed and

Hester v. Durham Traction Co

used exclusively by a railroad company as a part of its continuous line of railroad comes within the denomination of "railroad track," then a bridge approach, such as is the one here under consideration, being used exclusively as a railroad track for railroad purposes, comes within the denomination of "railroad track." See, also, *People v. Atchison, Topeka & Santa Fe Railway Co.*, 206 Ill. 252, 68 N. E. 1059. In *Quincy, Omaha & Nebraska City Railway Co. v. People*, 156 Ill. 437, 41 N. E. 162, where it appeared that the property in question was used altogether for railroad purposes, and was all necessary in the operation and management of the road, it was held that the only legal assessment made of the property was that made by the State Board of Equalization assessing the property of appellant as railroad track, although the main track of the road was all in another state, and its depots, switchyards, shops, and sidetracks were in this state, and used for railroad purposes by the aid of a leased track; and it was there further held that the assessment made by the local assessor was null and void.

Inasmuch, therefore, as the appellee's bridge approach, with its embankment and viaduct and elevated tracks, comes within the denomination of "railroad track," the county assessor had no power to assess it, whether it is exempt from taxation, or not, under appellee's charter. Consequently the decision of the trial court in sustaining the second objection above mentioned was correct. Accordingly the judgment of the county court is affirmed.

Judgment affirmed.

HESTER *v.* DURHAM TRACTION CO.

(Supreme Court of North Carolina, May 2, 1905.)

[50 S. E. Rep. 711.]

Street Railways—Additional Servitude.*

The construction of a street passenger railway does not impose an additional servitude on the property fronting on the street so occupied, though in the original laying out of the street a mere easement was taken, and not the fee.

Sidewalks—Rights of Abutting Owners.

A city sidewalk being a part of the street which the city has set apart for the use of pedestrians, an abutting proprietor has no more right therein than in the roadway of the street.

Same—Same.

An abutting proprietor is only entitled to have the street and sidewalk in front of his premises open and unobstructed so as not to impair ingress or egress to his lot by himself and those whom he invites there.

*See foot-note appended to *Knapp & Cowles Mfg. Co. v. New York, etc., R. Co.* (Conn.), 11 R. R. R. 134, 34 Am. & Eng. R. Cas., N. S., 134.

Hester v. Durham Traction Co

~~Same—Same—Street Railway—Construction of Curve—Ingress and Egress.~~†

Complainant owned an irregularly shaped lot, which was only 7 feet 7 inches wide at the intersection of two streets on which street car tracks were laid; the length of the curb in front of such lot at the intersection of the streets being but 22 feet 5½ inches. The sidewalks adjoining the lot on the two streets were 10 and 8 feet wide, respectively, and between the curb and the nearest rail of the track was a distance of 15½ feet on one street and 13½ feet on the other. In order to transfer cars from one track to the other, a curve was constructed in front of the narrow portion of complainant's lot in such a manner that cars passing over it extended over a small corner of one angle of the sidewalk; the rails being laid level with the street, and the ties being buried at the shortest part of the curve slightly under the sidewalk. On three or four occasions when the curve was first used, cars ran off the track at such place: *held*, that such facts were insufficient to show that complainant's right of egress and ingress to his lot was damaged by the curve.

Appeal from Superior Court, Durham County; Bryan, Judge.

Bill by W. D. Hester against the Durham Traction Company. From a decree in favor of defendant, plaintiff appeals. Affirmed.

Winston & Bryant and Fuller & Fuller, for appellant.
Manning & Foushee, for appellee.

CLARK, C. J. The plaintiff owns the lot which occupies the apex of the acute angle which lies at the junction of Main and Chapel Hill streets, in the city of Durham. The defendant, by permission of the board of aldermen of the city, laid a curved track to pass from one street to the other, as per below diagram:

(Diagram omitted, as not essential.)

This track was located and laid under the direction of the street commissioner, who made his report to the board of aldermen, the expenses of the work being borne by the defendant. This curved track was used in the summer in the evenings from 6:30 until the cars went to the barn for the night, about 11 or 11:30. The curve was laid for the convenience of the public in going from West Durham to the park and returning. Prior to its being laid, the passengers had to be transferred at that point, known as "Five Points," or else the West Durham car had to go down Main street, and, reversing fenders, seats, and trolley, run back up Chapel Hill street. To avoid this great inconvenience to the public, the board of aldermen authorized this curve to be put in to run round the sharp angle at the junction of the two streets. Only passenger cars are used—no freight cars. On Main street the nearest rail of the track is 15½ feet from the outside edge of the sidewalk, and it is 13½ feet on Chapel Hill street

†As to what are the elements of damages sustained by abutting owners from the construction of railroads in streets, see foot-note appended to *Illinois Cent. R. Co. v. Trustees (Ill.)*, 14 R. R. R. 117, 37 Am. & Eng. R. Cas., N. S., 117; *Kansas City N. W. R. Co. v. Schwake (Kan.)*, 14 R. R. R. 52, 37 Am. & Eng. R. Cas., N. S., 52.

Heater v. Durham Traction Co

from the nearest rail to curb. The curved track in rounding the point does not touch the sidewalk, but at the southeast corner, as the curve enters Chapel Hill street, the edge of the car for a few inches of distance is slightly over the edge of the sidewalk. The complaint avers that the rear of the car does this, but this is evidently a mistake, for, as the concave side of the curve is towards the plaintiff's lot, the rear of the car necessarily swings outward, not in. It is also in evidence that at the southeast corner of the sidewalk the cross-ties, extending 18 inches further than the rail, have their extreme ends under the sidewalk. They are not above the surface, but under, and as the cross-ties, thus imbedded out of sight, cannot impede the use of the sidewalk, which is the property of the city, the plaintiff can have no possible ground of action on that account. The sidewalk on Main street is 10 feet wide, and that on Chapel Hill street is 8 feet. The southeast corner, where the passing car overhangs, is diagonally distant about 11 feet from the southeast corner of the plaintiff's lot.

The plaintiff's cause of action depends upon whether he is injured in the use of his property by the slight overhanging of the pavement by the car for an instant of time as it passes the southeast corner where the curve enters or leaves Chapel Hill street. The charter of the city of Durham shows that, as usual, the city has the same right and title to the sidewalks as to the rest of its streets. The defendant's track was laid under authority of its charter, "permission being first had" of the city as required. The construction of a street passenger railway "does not impose any additional servitude upon the property fronting on the street so occupied." *Merrick v. Railway*, 118 N. C. 1081, 24 S. E. 667, citing *Railroad v. Montgomery*, 167 Pa. 70, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659; *Kenelly v. Jersey City* (N. J.) 30 Atl. 531, 26 L. R. A. 281; *Elliott, R. & S.* 558; *Cooley, Const. Lim.* 683; *Dillon, Mun. Corp.* (4th Ed.) § 723. To the same purport, *Railroad v. Street Railway*, 120 N. C. 523, 26 S. E. 913; *Smith v. Goldsboro*, 121 N. C. 350, 28 S. E. 479; *Tel. Co. v. Railroad* (Tenn.) 29 S. W. 104, 27 L. R. A. 239; *Railroad v. Higbee* (Wis.) 83 N. W. 701, 51 L. R. A. 923; *Booth, St. Railways*, § 83; *Joyce on Elec.* §§ 336-339, 341; 27 Am. & Eng. Enc. (2d Ed.) 27-29.

The authorities, with singular uniformity, concur that it is "now well settled that the use of the streets in cities or villages for a street railway is one of the ordinary purposes for which such streets and highways may be used, and does not impose an additional burden or servitude, so as to entitle the abutting property owner, as a matter of right, to compensation before such use can be made. * * * This rule is generally recognized, irrespective of the question whether, in the original laying out of the street, a mere easement was taken, leaving the fee simple in the abutting

Heater v. Durham Traction Co

property." The rights, powers, and liability of the municipality extend equally to the sidewalk as to the roadway, for both are parts of the street. *Tate v. Greensboro*, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671; 2 *Smith, Mun. Corp.* § 1304; *Elliott, supra*, § 20. This is recognized by Code, § 3803, and by the courts, which hold towns and cities to the same degree of liability for failure to repair sidewalks as to repair the other part of the street. *Bunch v. Edenton*, 90 N. C. 431; *Russell v. Monroe*, 116 N. C. 726, 21 S. E. 550, 47 Am. St. Rep. 823; *Neal v. Marion*, 129 N. C. 345, 40 S. E. 116; *Wolfe v. Pearson*, 114 N. C. 62, 19 S. E. 264; 2 *Dillon, supra*, § 780, note 1; *Id.* §§ 1008, 1012. In *Bunch v. Edenton, supra*: "It was the positive duty of the corporate authorities of the town to keep the streets, including the sidewalks, in proper repair." The charter of Durham gives the same powers over sidewalks, and imposes the same liabilities upon the city for failure to repair the sidewalks, as in regard to the other part of the street. In *Railroad v. Higbee (Wis.)* 83 N. W. 701, 51 L. R. A. 929, it is said: "There is no limit to the public right to use a street, and every part of it, so long as that use is in aid of public travel thereon, and does not unnecessarily interfere with the common use of the way by ordinary modes of travel, and is no substantial impairment of private rights of property."

The complaint avers three grounds of damage:

(1) That two inches of the plaintiff's lot is covered by the defendant's track. But the evidence shows that the rail at the nearest point of the curve is three inches outside the curbing to the sidewalk, and the pleadings admit that no part of the plaintiff's lot (inside the sidewalk) is overhung by the car in passing.

(2) That vehicles have almost no approach to the lot. But the evidence is that between the outer edge of the sidewalk and the defendant's nearest rail there is 15½ feet on Main street and 13½ feet on Chapel Hill street. It is only at the apex—at the toe of the boot, so to speak—that the track approximates the outer edge of the sidewalk. There is ample evidence that the curve does not interfere with carriages standing on either street in front of the plaintiff's lot. As the toe of the plaintiff's lot is only 7 feet 7 inches, and, being an acute angle, it would be barely a foot, perhaps, at the edge of the sidewalk, a carriage could not stand there. The toe of the sidewalk (the cross-sidewalk) is 22 feet 5½ inches, but over 20 feet of this is "frontage," not of the plaintiff's lot, but caused by continuation of the two sidewalks, for, if the plaintiff's lot were extended to the eastern edge of the sidewalk at that place, it would be narrowed, is already said, to a point with almost no front at all.

(3) That cars frequently run off the track at that point. The only evidence is that they did run off the track three or

Heater v. Durham Traction Co

four times when the curve was first used. There is no evidence of any injury to the plaintiff from this cause.

The sidewalk is simply a part of the street which the town authorities have set apart for the use of pedestrians. 27 Am. & Eng. Enc. (2d Ed.) 103; *Ottawa v. Spencer*, 40 Ill. 217; *Chicago v. O'Brien* (Ill.) 53 Am. Rep. 640. The abutting proprietor has no more right in the sidewalk than in the roadway. His rights are simply that the street, including roadway and sidewalk, shall not be closed or obstructed so as to impair ingress or egress to his lot by himself and those whom he invites there for trade or other purposes. *Moose v. Carson*, 104 N. C. 431, 10 S. E. 689, 7 L. R. A. 548, 17 Am. St. Rep. 681; *White v. Railroad*, 113 N. C. 610, 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. Rep. 639. As said in *State v. Higgs*, 126 N. C. 1014, 35 S. E. 473, 48 L. R. A. 446: "An abutting owner to a street and sidewalk has an easement in his frontage which he may use in subordination to the superior rights of the public." Sidewalks are of modern origin. Anciently they were unknown, as they still are in Eastern countries, and in perhaps a majority of the towns and villages of Europe. In the absence of statutes, a town is not required to construct a sidewalk. *Atty. Gen. v. Boston*, 142 Mass. 200, 7 N. E. 722. It is for the town to prescribe the width of the sidewalk. In the absence of statutory restriction, it may widen, narrow, or even remove a sidewalk already established. *Attorney General v. Boston*, supra. To widen a sidewalk narrows the roadway. To widen the roadway narrows the sidewalk. The proportion of the street to be preserved for pedestrians and vehicles, respectively, is in the sound discretion of the town authorities. Here they might narrow the sidewalk at the toe of the plaintiff's lot by drawing in its outer edge, or it might make the outer edge curving to correspond with the curve of the car track, and thus prevent the car overhanging the edge of the sidewalk. If so, it may, so far as the plaintiff is concerned, let the car overhang the corner instead of cutting off that corner from the sidewalk. If the sidewalk were so far narrowed as to impede the circulation of passers-by on foot, so as to hinder the ingress and egress to the plaintiff's building, he would have cause of complaint, but such is not the case here. If the overhanging of the car were to injure any one walking on the sidewalk, such person might possibly have a cause of action against the city or the defendant, for the establishment and maintenance of the sidewalk are an invitation to pedestrians to walk anywhere thereon, but the plaintiff would not be injured thereby in his property rights to the lot, which is this cause of action. As to pedestrians, the city can protect itself by reducing the width of the sidewalk at that point, or, by condemning a few inches of the plaintiff's lot, it could make a cut-off at the outer corner without reducing the width of the sidewalk; but it should be remembered

Rosenbaum v. Meridian Light & Ry. Co

that that small space, occasionally overhung by a passing car, is at a corner of the street, and therefore the sidewalk, measured diagonally, is wider there than elsewhere, and would still be wider, though the little space overhung were cut off from the sidewalk, or the outer curbing of the sidewalk were drawn in and made curving at that point.

In holding that the acts of the defendant complained of by the plaintiff were not unlawful and did not constitute a cause of action, there was no error.

ROSENBAUM *v.* MERIDIAN LIGHT & RY. CO.

(Supreme Court of Mississippi, May 1, 1905.)

[38 So. Rep. 321.]

Street Railroads—Track Construction—Switches—Interference with Street—Rights of Abutting Property Owner.*

Where a street railway company maintained a single track down the center of a street in front of plaintiff's property, and a diamond switch proposed to be built according to the grade of the street would leave a space of 10.5 feet between the edge of a passing car and the curb on one side and 9.7 feet on the other, its construction did not constitute a material obstruction to the public use of the street, nor operate as a serious interference with plaintiff's enjoyment of his abutting property.

Appeal from Chancery Court, Lauderdale County; J. L. McCaskill, Chancellor.

Action by M. Rosenbaum against the Meridian Light & Railway Company. From a decree for defendant, plaintiff appeals. Affirmed.

M. Rosenbaum filed the bill in this case against the Meridian Light & Railway Company in the chancery court of Lauderdale county. The bill alleges that complainant is the owner of two houses and lots in the city of Meridian fronting and abutting on Eighth street between Twenty-Eighth and Twenty-Ninth avenues; that the defendant company is the owner of an electric street railway in said city, and has for some time past operated one line of track along the center of said street by complainant's property; that the defendant company is now proceeding, without the consent of complainant or other abutting owners, to build and construct a second track along said Eighth street, in addition to the track now there, to be used for switching purposes; that the construction of this second track will amount to a practical

*See generally, foot-note appended to *Illinois Cent. R. Co. v. Trustees* (Ill.), 14 R. R. R. 117, 37 Am. & Eng. R. Cas., N. S., 117; foot-note appended to *Kansas City N. W. R. Co. v. Schwake* (Kan.), 14 R. R. R. 52, 37 Am. & Eng. R. Cas., N. S., 52; foot-notes appended to *Dean v. Ann Arbor R. R.* (Mich.), 13 R. R. R. 365, 36 Am. & Eng. R. Cas., N. S., 365; *Stockdale v. Rio Grande Western Ry. Co.* (Utah), 12 R. R. R. 527, 35 Am. & Eng. R. Cas., N. S., 527.

Rosenbaum v. Meridian Light & Ry. Co

confiscation of said street to defendant's use, and will render the said street dangerous to the traveling public; that it will greatly impair and practically destroy the rights of complainant, and will greatly interfere with complainant's proper and beneficial enjoyment of said property; that it is an unwarranted obstruction of said public street and of the use thereof by the public, to the damage of complainant, and that such obstruction will be and is a nuisance which will diminish the comfort of complainant and the other abutting owners, and will diminish the value of complainant's property; that defendant is proceeding to take and damage complainant's private property for public use without having first made or offered to make compensation therefor. The prayer is that a writ of injunction issue restraining defendant from building and constructing said track. Defendant answered the bill, denying the material allegations thereof, and then made a motion to dissolve the injunction that had been granted. On this motion affidavits and evidence were heard, and on the hearing of the motion a decree was rendered dissolving the injunction and giving damages to the defendant. From that decree complainant appeals.

Hall, Hall & Jacobson and A. S. Bozeman, for appellant.
Miller & Baskin and W. H. Ambrecht, for appellee.

TRULY, J. The allegation of the bill of complaint relating to the only matter presented to us for consideration was that the contemplated building of a diamond switch by the appellee in Eighth street, of the city of Meridian, would render ingress and egress to appellant's property difficult; that the same would constitute a nuisance, and would impair the value of the property by reason of the interference with the street. The testimony shows, and this is admitted by the bill of complaint, that the appellee company now maintains a single track down the center of the street in question, and its right to lay tracks upon the streets of Meridian under a properly acquired franchise is not questioned nor involved in the litigation. This being so, the whole controversy resolves itself into a question of disputed fact; and as to this, while there is some conflict, the great preponderance of the testimony sustains the conclusion of the chancellor. The map in the record, and which, by agreement of counsel, is to be used on the hearing of this appeal, discloses that even after the diamond switch is built there would be between the curb line and the edge of a passing car 10.5 feet on one side and 9.7 feet on the other. This would be the narrowest space left outside of the double track at any point along the switch. The testimony developed that the railway would be constructed according to the grade of the street, and would be level with the surface of the highway. On this single question of fact the chancellor decided that the construction of the proposed switch would not materially obstruct the public

St. Louis & N. A. R. Co. v. Crandall

use of the street, nor operate as a serious interference with appellant's enjoyment of his property. On this record we think the conclusion manifestly correct. We expressly confine our decision to the one question adverted to. Affirmed.

ST. LOUIS & N. A. R. CO. v. CRANDALL.

(Supreme Court of Arkansas, April 15, 1905.)

[86 S. E. Rep. 855.]

Contract—Station—Location—Abandonment—Liability. *

Plaintiff proposed to defendant railroad company that he would give a right of way over his land and \$1,000 if the railroad station should be erected on an adjoining tract. The offer was accepted, and plaintiff paid \$1,000 to the owner of the adjoining tract, who executed a deed to the railroad company. Plaintiff then gave defendant a deed of the right of way reciting a consideration of \$1, and when the railroad had erected the station both deeds were delivered to it. Defendant maintained the station as a passenger and freight station for one year, and then erected a passenger station 500 yards distant, and maintained the original structure solely as a freight depot: *held*, that there was a valid contract between plaintiff and the railroad company for the location of the station on the tract adjoining plaintiff's land, and that plaintiff was entitled to damages for the abandonment of the station as a passenger station.

Deed—Consideration—Parole Evidence.

Parol evidence was admissible to show that the real consideration for plaintiff's deed of the right of way was the agreement of defendant to erect and maintain a station on the adjoining tract.

*For the authorities in this series on the obligations and liabilities of railroad companies under contracts by which they agree to locate and maintain stations or depots at certain points, see *Louisville, etc., Ry. Co. v. Whipps* (Ky.), 13 R. R. R. 744, 36 Am. & Eng. R. Cas., N. S., 744 (measure of damages for breach of contract to locate station); *Beasley v. Texas & Pac. Ry. Co.* (U. S.), 11 R. R. R. 846, 34 Am. & Eng. R. Cas., N. S., 846 (public policy prevented decree for specific performance of contract not to build station at certain point); *McCormick v. Louisiana & N. W. R. Co.* (La.), 7 R. R. R. 861, 30 Am. & Eng. R. Cas., N. S., 861 (right of landowner to cause removal of depot which has become inadequate); *Griswold v. Minneapolis, St. P. & S. S. M. Ry. Co.* (N. Dak.), 10 R. R. R. 153, 33 Am. & Eng. R. Cas., N. S., 153 (agreement to erect depot at certain point was not against public policy); *Cadiz R. Co. v. Roach* (Ky.), 7 R. R. R. 502, 30 Am. & Eng. R. Cas., N. S., 502; *Southern California Ry. Co. v. Slauson* (Cal.), 6 R. R. R. 231, 29 Am. & Eng. R. Cas., N. S., 231 (remedy for breach of contract to locate depot); *Murray v. Northwestern R. Co.* (S. Car.), 5 R. R. R. 411, 28 Am. & Eng. R. Cas., N. S., 411 (specific performance of contract to erect depot); note, 21 Am. & Eng. R. Cas., N. S., 835 (whether contracts to locate stations or depots at designated points are void as against public policy); *Yazoo & M. V. R. Co. v. Baldwin* (Miss.), 21 Am. & Eng. R. Cas., N. S., 479 (action for breach of contract to establish depot, defenses); *Texas & P. Ry. Co. v. Scott* (C. C. A.), 8 Am. & Eng. R. Cas., N. S., 309 (agreement to erect station, maintenance); *People v. Board of R. Com'rs of State of N. Y.* (N. Y.), 15 Am. & Eng. R. Cas., N. S., 441 (contract between company and citizens for stopping trains at certain stations was not enforceable by railroad commission); footnote appended to *Lucas v. New York, etc., R. Co.* (C. C. A.), 14 R. R. R. 85, 37 Am. & Eng. R. Cas., N. S., 85 (forfeiture of right of way for failure to comply with terms of grant).

St. Louis & N. A. R. Co. v. Crandall

Location of Station—Breach of Contract—Defense—Duty to Construct Station within Corporate Limits.

Kirby's Dig. § 6709, provides that when not less than 50 citizens of any incorporated town on the line of any railroad shall make application in writing it shall be the duty of the railroad to stop all trains, freight or passenger, within the corporate limits of the town: *held*, that where a railroad contracted with a landowner to erect a station at a point without the corporate limits, the fact that it was thereafter required to erect a station within the corporate limits did not relieve it from liability to the landowner for moving the station.

Location of Station—Statute.

A railroad cannot be forced to comply with the statute until the town authorities have acted pursuant thereto.

Same—Same.

A railroad station providing for passengers only could not be regarded as erected in obedience to the statute.

Appeal from Circuit Court, Boone County; John N. Tillman, Judge.

Action by one Crandall against the St. Louis & North Arkansas Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The appellant railroad company was contemplating building from Eureka Springs east into Boone county, and the citizens of Harrison were seeking to induce it to build to that town. The railroad company required as a condition for so doing a certain cash bonus, the donation of right of way from the Boone county line, and station grounds at Harrison. The officials of the railroad visited Harrison, and while they were there a public meeting was held to further the enterprise. The object was to secure subscriptions and donations to comply with the requirements of the railroad company. Crandall owned a tract of land near the town. He was absent the day of the meeting, and was sent for, and received in the meeting with cheers, to "encourage him to make his usual donation." The meeting had been discussing various station grounds, and, among others, a tract owned by Mrs. Josephine Murray, adjoining Crandall's land. Judge E. G. Mitchell was representing her in the matter, and stated that, if the depot was located on a 20-acre tract of hers, she would donate 10 acres and sell the other 10 for \$1,000. Taking the evidence favorable to Crandall (although there was no serious conflicts in any of it), as the finding must be tested by the sufficiency of his evidence, the following was the course of events: Crandall stated that he did not want the depot on his land, but wanted it by him on the Murray land, and if the Murray tract was selected he would give 81,000 and the right of way through his own land. A committee was appointed to confer with the railroad officials, and Crandall conferred with them himself, and was given to understand that his proposition would be accepted, but for him to see Watkins, the president of the road. He then went to Mr. O. W. Watkins, the president of the road. Mr. Watkins was a

leading lawyer of his part of the state, was raised in Boone county, and known well and favorably to all the parties connected with the transaction. Mr. Watkins told him (so Crandall testifies) that his proposition was accepted. Crandall, Murray, Judge Mitchell, and Mr. Watkins went to a law office to draw a contract. In the meantime Judge Mitchell had succeeded in getting Mr. Crandall to raise the amount to be paid Mrs. Murray to \$1,100. Mr. Watkins dictated and Judge Mitchell wrote the contract, which was signed by Mrs. Murray and Crandall. This contract was lost, and its contents shown by parol, with the usual varying versions. Crandall made deed to the railroad company for the right of way through his land, reciting a consideration of \$1. Mrs. Murray executed a deed for the 20 acres, reciting a consideration of \$1,100, and it contained this clause: "This land is granted to said railroad company for railroad purposes and is to be used by said railroad company for the purpose of keeping and maintaining a railroad station on the same and to be used by it for other purposes connected with said railroad and the operation thereof, and for no other purposes." Crandall paid Mrs. Murray the \$1,100, and when the railroad fulfilled its part of the contract with the people of Harrison and was built there within the time stipulated the deeds were delivered to Mr. Watkins. After the agreement referred to, 89 of the citizens entered into contract with the railroad company guarantying the fulfillment of its various requirements, including the furnishing of this right of way and station facilities procured of Mrs. Murray and Crandall. The deeds of Mrs. Murray and Crandall were executed after the written agreement with the citizens, but the agreement dictated by Mr. Watkins, which was evidently only between Mrs. Murray and Crandall, so far as it was written, was made before the citizens' written agreement. Crandall erected various improvements on his property suitable to its then location close to the station. The railroad maintained the station it erected on the Murray land as a freight and passenger station for the town of Harrison for a year, and then erected a passenger station 500 yards distant, and abandoned the Murray depot as a passenger depot, and maintained it solely as a freight depot. No tickets were thereafter sold at the Murray depot, and no passenger trains stopped there. The Murray depot was not within the corporate limits. More than 50 citizens of Harrison signed a petition in conformity to section 6709, Kirby's Digest, to require the railroad to establish a stopping place convenient for the reception and handling freight, receiving and discharging passengers, etc. This was delivered to the president of the railroad. The town authorities did not take action contemplated by section 6710, but interested citizens raised the money necessary to defray the expenses of the railroad in establishing the new station. The new station is solely a passenger station, and freight is

St. Louis & N. A. R. Co. v. Crandall

not received, handled, or discharged there. Crandall sued the railroad for damages by reason of removing the passenger station, and among the elements of damages claimed was the \$1,100 paid Mrs. Murray, the value of the right of way through his land, the loss in value of property built by him near the depot, and other matters not necessary to mention, as the appellant admits the evidence sustains the amount found, and is only contesting the liability. The case was tried before the court sitting as a jury, and damages assessed at \$2,500, and the railroad company appealed.

G. J. Crump and J. V. Walker, for appellant.
J. W. Story and B. B. Hudgins, for appellee.

HILL, C. J. (after stating the facts). 1. The appellant contends that appellee had no contract with it other than what appears in his right of way deed. The evidence adduced by appellee amply sustains the finding that there was a contract between appellee and the railroad company. The propositions made in the citizens' meeting were submitted to the railroad company, and accepted by it, and then the parties, under the direction of the railroad company's president, proceeded to make a contract between themselves so as to effectuate the propositions made and accepted. Every move of Mrs. Murray and Crandall was conditioned on the acceptance by the railroad company of that site as the station grounds. There is some difference as to the extent Mr. Watkins dictated the contract, which is wholly immaterial. It was drawn only after he notified both parties that the railroad company would accept the proposition, and this contract was between Crandall and Mrs. Murray binding each other reciprocally to the terms agreed upon so that it could be made effective between them when the time came to deliver the deeds to the railroad company. Later the railroad company took a written guaranty from citizens to the effect that the various matters it required would be furnished free of expense to the company. This did not in any way alter the status of the depot proposition. It merely guarantied, *inter alia*, that it would be given as stipulated. If Mrs. Murray had conveyed to Crandall in consideration of the money paid her by him, and then he conveyed the land to the railroad company with a right of way over his other land, then the transaction would have been plainer, but not different in legal effect, from the actual one. The real consideration of Crandall's conveyance of his right of way and securing the Murray land was the establishment of a depot on the Murray land, so that his property would be enhanced in value thereby. The agreement of the railroad company that it would put the depot there, the full knowledge of Crandall furnishing the money for the purchase of the Murray land, the acceptance of Crandall's right of way deed with a nominal consideration when the real one was known, constituted a

contract between Crandall and the railroad company that it would locate the depot on the Murray land. So far as Crandall and the railroad company were concerned, the contract rested in parol, and was carried out by three different writings—one the contract dictated by the president of the railroad company between Mrs. Murray and Crandall and the two deeds from Mrs. Murray and Crandall respectively, to the railroad company consummating the agreement. It is insisted that Crandall's deed alone evidences the consideration for it, but this court has often held that the consideration named in a deed is only *prima facie* evidence of the real consideration, and parol evidence is admissible, not to defeat the deed, but to prove the real consideration therefor, with limitations not necessary to develop here. *Jordan v. Foster*, 11 Ark. 139; *Pate v. Johnson*, 15 Ark. 275; *Vaugine v. Taylor*, 18 Ark. 65; *Barnett v. Hughey*, 54 Ark. 195, 15 S. W. 464; *Kelly v. Carter*, 55 Ark. 112, 17 S. W. 106; *Busch v. Hart*, 62 Ark. 330, 35 S. W. 534; *Davis v. Jernigan*, 71 Ark. 494, 76 S. W. 554. It is permitted the landowner, applying this rule to these facts, to show by parol that the consideration for a right of way deed was the erection of a depot on the ground. 1 *Rorer on Railways*, p. 483; *Watterson v. Ry.*, 74 Pa. 208. The application of these principles to the case at bar sustains a contract between appellee and appellant as having been validly made and properly proved.

2. Objection is made to the testimony of the occurrences at the citizens' meeting. This was upon the theory that Crandall's deed was all the evidence admissible, and, it being in writing these were prior occurrences merged into it and therefore inadmissible. As indicated in discussing the other question, the deeds were not the entire contract by any means. They were but parts of the execution of the contract between the railroad company and Crandall which rested in parol. Carrying out a parol contract by executing a deed in furtherance of it is not offending against the rule forbidding alteration, addition, or variation of written contracts by parol. *Kelly v. Carter*, 55 Ark. 112, 17 S. W. 706.

3. Appellant contends that the establishment of the passenger depot within the corporate limits was required by law, and rendered unnecessary the further maintenance of the depot 500 yards distant on the Murray place. If that be conceded it does not help appellant. When it contracted to locate the depot on the Murray land it knew it could be compelled to comply with the statute and maintain a depot in the corporate limits also, and it should have contracted against this possibility if it desired to avail itself of a right to abandon this one. The evidence fails to show a forced location of the depot in compliance with a statutory requirement and in fulfillment thereof. The town authorities never acted, and the railroad could not have been forced to comply with the statute till they did. *Ry. v. B'Shears*, 59 Ark. 237, 27 S. W.

Denver & R. G. R. Co. v. Gunning

2. But it is insisted that the railroad could waive that, and when it accepted the money from the citizens it became, in legal effect, as if the statute had been fully complied with. The evidence shows the new station is only a passenger depot, whereas the statutory requirement is "to stop all trains, freight or passenger, at some point within the corporate limits of such town most convenient for the reception and handling and discharge of freight and the reception and discharge of passengers," etc. Kirby's Dig. § 6709. It is plain that the new depot is not erected in obedience to and fulfillment of the statute, but is a voluntary act, and there has been a voluntary abandonment of the Murray depot as a passenger station.

4. The question discussed in *Ry. v. Birnie*, 59 Ark. 66, 26 S. W. 528, as to the length of time a depot must remain in order to be a performance of the condition of the donation was not raised in this case.

The judgment is affirmed.

DENVER & R. G. R. CO. et al. v. GUNNING.

(Supreme Court of Colorado, March 20, 1905.)

[80 Pac. Rep. 727.]

Death of Passenger—Evidence.

In an action against a railroad company for the death of a passenger, evidence held sufficient to show that such passenger was killed in the accident in question.

Death of Wife—Damages.*

In an action by a husband for the death of his wife, damages can only be awarded for his pecuniary loss.

Same—Same—Earning Capacity.

In an action by a husband for the death of his wife, what she might earn per annum was a proper element for the consideration of the jury on the question of damages.

Same—Same.

In an action by a husband for the death of his wife it was not error to instruct that in determining the amount of damages to be awarded plaintiff the jury should conscientiously apply their own observation, experience, and knowledge to the facts and circumstances of the case.

Same—Excessive Verdict.

In an action by a husband for the death of his wife, who was 23 years of age, with an expectancy of a little over 40 years, who had since her marriage been earning something like \$400 per annum, and who was intelligent and cultured, frugal and industrious, a verdict for \$4,000 was not excessive.

Death of Passenger—Action against Receiver after Discharge.

A decree of foreclosure against a railroad was entered in the federal court, and the property sold thereunder, but the decree provided that the purchaser should pay all indebtedness or liabilities incurred by the receiver before the delivery of possession to the extent that the assets

*As to the elements of damages recoverable by husband or wife for death or injuries of the other, see foot-note appended to *Smith v. Lehigh Valley R. Co.* (N. Y.), 11 R. R. R. 746, 34 Am. & Eng. R. Cas., N. S., 746, where the preceding authorities in this series are collected.

Denver & R. G. R. Co. v. Gunning

in the hands of the receiver were insufficient for that purpose, and conveyance was made in accordance with the decree, and an order entered that the discharge of the receiver should not prevent him from defending, as might be necessary, any action brought against him as such receiver: *held*, that notwithstanding the discharge of the receiver, an action for the death of a passenger during the time that the railroad property was being operated by the receiver was maintainable against him.

Same—Parties—Receivership—Purchaser.

Civ. Code, § 11, provides that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. A decree of foreclosure against the property of a railroad was entered in the federal court, and the property sold thereunder, the foreclosure decree providing that the purchaser at sale should take the property subject to all liabilities incurred by the receiver before the delivery of the possession to the extent that the assets in the hands of the receiver were insufficient for that purpose: *held*, that the purchaser was properly joined as a defendant in an action for the death of a passenger while the railroad was being operated by the receiver.

Same—Same—Same—Same—Action in State Court.

Inasmuch as an act of Congress provides that the receiver of any property appointed by any federal court may be sued without the previous leave of the court appointing him, and inasmuch as a decree appointing a receiver of railroad property expressly provided that he might be sued in any court of competent jurisdiction, the purchaser of the property under a decree of foreclosure which provided that the purchaser should take the property subject to any liability incurred by the receiver before delivery of possession to the extent that the assets in the hands of the receiver were insufficient for that purpose, could be sued in a state court in an action for the death of a passenger while the railroad was being operated by the receiver.

Appeal from District Court, Arapahoe County; F. T. Johnson, Judge.

Action by John B. Gunning against the Denver & Rio Grande Railroad Company and others for alleged negligence causing death of plaintiff's wife. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Rogers, Cuthbert & Ellis, Henry T. Rogers, and Pierpont Fuller, for appellants.

Rickel & Crocker and Stuart & Murray, for appellee

GABBERT, C. J. Shortly after midnight, and on the morning of September 10, 1897, near New Castle, Colo., a collision occurred between the west-bound passenger train operated by the Denver & Rio Grande Railroad Company and a east-bound freight train operated by the receiver, which resulted in the death of a number of passengers riding on the passenger train. Several of the coaches were consumed, and a number of bodies burned. The plaintiff claims that his wife was a passenger and killed in this wreck, either by the impact or the result of the fire. What was claimed to be her remains was so badly burned that identification from the remains itself was impossible. At the close of the

testimony the court directed a verdict for plaintiff, submitting to the jury only the amount of damage to be awarded. Error is assigned on this action. One of the litigated questions of fact is whether or not the remains of plaintiff's wife was found in the wreck.

The first point we shall consider is the claim on the part of counsel for appellants that incompetent testimony was admitted to establish that Mrs. Gunning was a passenger on the wrecked train at the time of the collision. We do not believe it is necessary to enter into a discussion of the testimony which it is claimed was incompetent, or pass upon the question as to whether it was or was not admissible, because that which is not objected to is undisputed, and that which is clearly competent reads irresistibly to the conclusion that Mrs. Gunning was killed in the wreck. It appears that Mrs. Gunning was a young woman about 23 years of age, and had been married something over a year, and for some time previous to leaving for Colorado had been living with her parents at or near Cedar Rapids, Iowa. Her husband was located at Ouray, and she left her parents' home with the intention of joining her husband at that point, where they intended to establish a home. She had purchased considerable household supplies, and shipped to Ouray previous to her departure for Colorado. On September 7, 1897, she purchased a ticket routed to Grand Junction over the Burlington, Cedar Rapids & Northern, Rock Island, and Denver & Rio Grande Railroads. This fact is established by the testimony of the ticket agent at Cedar Rapids. She took the train on the evening of the date the ticket was purchased, her father, mother, and several friends accompanying her to the depot and upon the train. Those persons testified as to her appearance, dress, and what she carried as baggage, particularly a grip slung across her shoulder, an easel, a basket of lunch, a small box, and a cape. When she started on this trip she carried a watch given her by her father and mother as a birthday present, and also was wearing finger rings, one of which was a diamond given her by her husband. After the train on which she was proceeding west left Kansas City, she became acquainted the next morning with a gentleman, who rode with her on that train to Denver, which point they reached the morning of September 9th. He describes her appearance, dress, and belongings, which substantially correspond with the testimony given by the father and mother on those subjects. He says that she had a gold watch, a hand bag with a long strap over her shoulder, a well-filled lunch basket, and a large easel. He assisted her to change trains at Denver, and accompanied her on the same train as far as Salida. They rode in the first car back of the smoker, which was an ordinary day coach. At Salida he left the train, and the lady whom he described continued on west. He identified a photograph of Mrs. Gunning as

Denver & R. G. R. Co. v. Gunning

the person with whom he rode on the train from Kansas City to Salida. A lady and her son, who were passengers on this same train from Denver to Salida, describe a passenger corresponding to Mrs. Gunning, and the lady particularly recalls the fact that this person had an easel and wore a diamond ring. These witnesses identified a photograph of Mrs. Gunning showed to them as the photograph of the person whom they describe as having seen on the train. They also state that she was on the train going west when it left Salida. The conductor of the passenger train between Salida and Grand Junction identified the coupon taken up by him, which, according to the marks, had been sold to Mrs. Gunning at Cedar Rapids. The coroner and another physician visited the scene of the wreck a few hours after the collision. The coroner, in his official capacity, superintended the recovery of the dead bodies, and took charge of the watches and jewelry found with the bodies. He testified that he found the trunks of two female bodies in the space occupied by the two coaches immediately in the rear of the smoker; that upon the body of one (an adult) he found a watch; that the cloth upon this body was not so badly burned but that its texture could be identified, and his statements as to the character of its texture correspond with the description of the clothing worn by Mrs. Gunning as testified to by her mother. In the ashes under where the two bodies lay a diamond set ring was also found by an assistant in his presence. He sent this watch and ring to the general passenger agent of the Rio Grande Road, who afterwards turned them over to the plaintiff. The testimony as to the finding of the watch and jewelry is corroborated in all particulars by the physician who assisted the coroner. The husband testified to having received the watch and ring from the general passenger agent of the Rio Grande Road, and identified them as the watch and ring of his wife. He afterwards delivered them to Mrs. Gunning's parents, who also identified them as the watch and ring worn by their daughter when she left for Ouray. It further appears from the testimony that her relations with her parents were of the most cordial nature, that when she left home she was in the best of spirits, and that there was not the slightest trouble between her and her husband. She has never been heard from since the time of the wreck.

It appears to us that this testimony establishes beyond all question the identity of the remains found in the wreck as those of Mrs. Gunning. The description of the witnesses who met her on the train between Kansas City and Salida substantially agrees with that of her father and mother. Her belongings, such as an easel and other articles she carried, are described by these same witnesses; the coupon of the ticket which she purchased, taken up by the conductor of the ill-fated train, the finding of a watch and ring on and near the body of an adult female, which, from the descrip-

tion, were undoubtedly the watch and ring she had on when she left Cedar Rapids, in connection with the fact that she has never been heard from by either parents or husband, it seems to us so conclusively settled the fact that she was killed in the wreck that further comment on this proposition is hardly necessary. Whether or not testimony was introduced on the part of the plaintiff for the purpose of establishing the fact that she was on the train at the time of the collision was incompetent is not a matter of which the defendants can complain, because the reception of such testimony is not reversible error when it is manifest that it could not have changed the result on the issue under consideration. There can be no doubt from the uncontroverted testimony but that the negligence of defendants was the cause of the collision. When undisputed, competent testimony in a civil action clearly establishes facts in issue, it is not error for the court to assume such facts proven and direct the jury accordingly.

The jury returned a verdict for \$4,000, and counsel for appellants claim that the sum awarded was excessive. The court instructed the jury to the effect that it was difficult to adduce direct evidence of the exact pecuniary loss occasioned the plaintiff by the death of his wife, or to show the exact value of her services, and that they were permitted to determine the question of damages from their own observation, experience, and knowledge conscientiously applied to the facts and circumstances of the case. This instruction is also assigned as error. The court had previously instructed the jury that in awarding damages they must consider the age, health, condition of life, and probable duration of the life of the deceased, her habits of industry and frugality, her mental and physical capacity to render services, her ability to earn money, and her disposition to aid or assist the plaintiff; but that the recovery allowable was in no sense a solace for the grief or injured feelings of plaintiff occasioned by the death of his wife, but must be limited to the net pecuniary benefit which the plaintiff might reasonably have expected to receive from a continuance of the life of the deceased, and that this pecuniary benefit would be the value of the wife's services less the cost of properly and suitably maintaining her. The testimony discloses that Mrs. Gunning was about 23 years of age; that her expectancy was a little over 40 years; that since her marriage she had been earning something like \$400 per annum; that from her earnings she had purchased supplies for their intended home in Ouray; that she was intelligent and cultured, frugal and industrious, and a devoted wife. Damages can only be awarded for the pecuniary loss resulting to the living party entitled to sue which is occasioned by the death of the deceased. The ascertainment of damages in cases of this character depends upon a variety of circumstances and future contingencies, and the

Denver & R. G. R. Co. v. Gunning

award of a jury should not be disturbed if it appears there is a substantial basis of facts upon which to predicate a finding of substantial pecuniary loss. Such loss cannot be determined with mathematical exactness. The chances and contingencies of life and death, of sickness and health, of accident and injury in the future would be such that it would be impossible for the jury to determine the exact pecuniary loss to the plaintiff, or the court to formulate any arbitrary rule for their guidance in determining the damages to be awarded. The services of a wife to the husband are not bestowed for pecuniary consideration, and yet the husband is entitled to compensation in money for their loss. What she might earn per annum would be a proper element to consider, but not the only one. In many ways the wife renders services which no witness can clearly define, enumerate, or estimate the value of with any degree of exactness. Necessarily, then, in determining the amount of damages in cases of this character, where future contingencies and variety of circumstances must be taken into consideration, the award must be left to turn mainly upon the sound sense and deliberate judgment of the jury. Their own observation, experience, and knowledge respecting these matters, conscientiously applied to the facts and circumstances of the case, would be important for them to consider in determining the amount of the award, and it is not error to so instruct. We are of the opinion that the testimony in the case fully sustains the amount of the damages awarded. *Pierce v. Connors*, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279; *Denver, S. P. & P. Ry. Co. v. Wilson*, 12 Colo. 20, 20 Pac. 340; *U. P. Ry. Co. v. Jones*, 21 Colo. 340, 40 Pac. 891; *Denver Tramway Co. v. Riley*, 14 Colo. App. 132, 59 Pac. 476; *Ry. Co. v. Barron*, 5 Wall. 90, 18 L. Ed. 591; *St. L., I. M. & S. Ry. Co. v. Needham*, 52 Fed. 371, 3 C. C. A. 129.

On behalf of the receiver it is claimed that he was discharged prior to the trial of the cause, and that the Colorado Midland Railway Company is not liable for plaintiff's claim, and was improperly joined as a defendant. At the time of the collision the property of the Colorado Midland Railroad Company was being operated by the receiver. A decree of foreclosure against the property had been entered in the federal court, and the property sold thereunder, but the sale was not consummated until later. The decree of foreclosure provided that the purchasers at the sale thereunder should take the property and receive a deed therefor upon the express condition that they should pay, satisfy, and discharge all indebtedness or obligations or liabilities legally contracted or incurred by the receiver before the delivery of the possession of the property sold to the extent that the assets or proceeds in the hands of the receiver were insufficient for that purpose. The decree was further conditioned as to the payment of such indebtedness on the part of the

purchasers that suit should be brought to enforce the same within the period allowed by the statute of limitations of the state. By the terms of the decree jurisdiction was retained by the court for the purposes of enforcing its provisions, and the right to retake and resell the property in case the purchasers neglected to comply with the order of the court was reserved. The property was conveyed to the Colorado Midland Railway Company in accordance with the terms and conditions of this decree. The order under which the receiver claimed to have been discharged recited: "It is further ordered that the discharge of the said receiver shall not operate to prevent the prosecution in the name of the said receiver of any suit instituted by him as such receiver and still undetermined, nor any appeal heretofore taken or which hereafter may be taken by him as such receiver, nor shall it operate to prevent him from defending, as may be necessary, any suit brought against him as such receiver, and still undetermined, or any suit that may hereafter be brought against him as such receiver." Counsel for the receiver insist that this action could not be maintained against him, because, when the property over which he had control passed from his hands in pursuance of the orders of the court, he was discharged from his trust, and his official liability ended with the termination of his official existence. This proposition is not applicable. It is clear from the decree and orders of the court to which we have referred that the receiver was only discharged conditionally. The property had passed from his hands to a purchaser, but upon the express condition that the legal liabilities incurred by him should be discharged by such purchasers. Evidently it was known to the court that actions were pending or obligations existed upon which suit might be brought, and that is why the decree respecting his discharge provided that it should not prevent him from defending actions then pending, or which might thereafter be brought. The court retained jurisdiction for the purpose of enforcing its orders against the purchaser for the payment of the indebtedness of the receiver, with authority in the receiver to defend actions brought against him in his official capacity; so that for the purposes of this action he was still to be regarded as the receiver of the Colorado Midland Railroad Company, and he still had the power under the decrees to which we have referred to satisfy the claim of plaintiff when reduced to judgment out of the property of the railroad company.

There can be no doubt regarding the liability of the Colorado Midland Railway Company to the plaintiff, because by the terms of its purchase of the property of the Colorado Midland Railroad Company it assumed this liability. The only question presented is whether or not it could be joined as a defendant in this action. Counsel for appellants claim it could not, because the action against the other defendants

was one in tort while that against the railway company was in contract. Our Civil Code (section 11) provides that "any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination or settlement of the question involved therein." The receiver, in his official capacity, is liable for the tort which is the basis of plaintiff's action. Plaintiff's judgment against him can only be satisfied out of the property under the control of the receiver. This property has been conditionally conveyed to the railway company. Its property could not be subjected to the payment of a claim until it has had an opportunity to defend an action which, when reduced to judgment, could be satisfied out of its property, and hence it is a necessary party to a complete determination of the rights of the parties responsible for the tort which is the basis of the plaintiff's action. The receiver, in his official capacity, is liable as the wrongdoer, and the railway company responsible because it has assumed that liability. Any action against either can only be maintained by the plaintiff by proving the tort, and his right to recover in this respect rests upon the same ground as against each. We do not think there is any misjoinder either of causes of action or defendants. *Knott v. D. & S. C. Ry. Co.*, 84 Iowa, 462, 51 N. W. 57.

It is also contended by counsel for appellant railway company that the district court was without jurisdiction as to that corporation. This claim is based upon the assumption that because the railway company acquired the property under the terms and conditions of a decree entered by the federal court the jurisdiction of that tribunal with respect to liabilities imposed by such decree was exclusive. The decree appointing the receiver expressly provided that he might be sued in any court of competent jurisdiction, or the claimant might, at his election, file an intervening petition in the cause, and have his demand adjudicated in the court having jurisdiction of the receiver. It further provided that judgments obtained against the receiver in the state courts, not appealed from, and judgments against the company which the receiver, by the terms of the order appointing him, was required to pay, and not appealed from, should be audited and allowed by the receiver as of course. It further provided that suit might be brought against the receiver in any court of competent jurisdiction without an application by the plaintiff in such suit to the court appointing the receiver for leave to do so. Further than this, there is an act of Congress which specially provides that the receiver of any property appointed by any federal court may be sued without the previous leave of the court appointing him. It thus appears not only from the terms of the decree, but from the act of Congress, that suit could be maintained against the receiver in the state court, and it certainly would not be

Pennsylvania Co. v. Loftis

logical to hold that the railway company, which was not only a proper, but a necessary party to a complete adjudication of the rights involved, could not be joined in that same action. By the decree the railway company assumed the obligation sued upon in this action, and the only limitation imposed upon that liability was that suit therefor must be brought within the period allowed by the statute of limitations of the state for the commencement of actions of this character. The decree does not state in what court such action should be brought. If it was the intention of the court, if it had the power to do so, to require actions against the railway company to enforce the liability which it assumed to be brought in the federal court, the decree would certainly have so recited. This action does not pertain to the administration of the affairs of the company for which the receiver was originally appointed, but is brought to enforce a liability on the part of the receiver which the railway company assumed as a purchaser under the direction of the court appointing the receiver. That this liability may be determined by any court having jurisdiction of the company and subject-matter is clear. There is no reason advanced why the state courts may not construe the force and effect of a decree entered by the federal court as well as the court directing such decree. The judgment of the district court is affirmed.

Affirmed.

PENNSYLVANIA CO. v. LOFTIS.

(Supreme Court of Ohio, April 11, 1905.)

[74 N. E. Rep. 179.]

Sale of Coupon Ticket—Contract—Responsibility for Connecting Carriers.

While a railroad company selling a coupon ticket for the transportation of a passenger over its own and a connecting line may, by contract, either express or implied, make itself responsible for the safe carriage of the passenger over the entire route covered by the ticket sold, yet the mere sale of such coupon ticket does not of itself import a contract or undertaking on the part of the company selling the same to become responsible for the safety of the passenger beyond its own line.

Same—Agent of Connecting Carrier—Presumption.*

Where a railroad company issues and sells a coupon ticket with coupons attached good over a connecting line, in the absence of other evidence the presumption is that as to such coupons the company is suing and selling the same, in making such sale, acts as the agent of the connecting carrier.

Same—Same—Parol Evidence.†

It is competent to prove by parol evidence, aside from the ticket sold, the contract made between the carrier and the passenger.

(Syllabus by the Court.)

*See foot-notes appended to *Missouri, etc., Ry. Co. v. Harrison* (Tex.), 13 R. R. R. 617, 36 Am. & Eng. R. Cas., N. S., 617.

†See foot-note appended to *Missouri, etc., Ry. Co. v. Harrison* (Tex.), 13 R. R. R. 617, 36 Am. & Eng. R. Cas., N. S., 617; foot-note appended to *Coine v. Chicago & N. W. Ry. Co.* (Iowa), 13 R. R. R. 316, 36 Am. & Eng. R. Cas., N. S., 316.

Pennsylvania Co. v. Loftis

Error to Circuit Court, Stark County.

Action by John Loftis against the Pennsylvania Company. Judgment for plaintiff was affirmed by the circuit court, and defendant brings error. Reversed.

Catharine Loftis, who was the wife of the defendant in error, John Loftis, on May 9, 1898, purchased from the plaintiff in error, the Pennsylvania Company, at its ticket office in Alliance, Ohio, an excursion ticket from Alliance to Columbus and return. The ticket issued to her was a special excursion coupon ticket containing four coupons.

After procuring the ticket, she boarded an excursion train at Alliance, on the Pennsylvania Lines, and entered upon her journey to Columbus. The Pennsylvania Lines extended only from Alliance to Orrville. When the excursion train reached Orrville, the coaches of said train, including the one in which said Catharine Loftis was a passenger, were switched to the track of the Cleveland, Akron & Columbus Railway, a connecting line, over which line they were then run from Orrville to Columbus. As the train was entering the city of Columbus, it was, by reason of the spreading of the track, derailed, several of the coaches were overturned and broken, and several of the passengers were injured; one person being killed. Among those injured was Catharine Loftis. Thereafter, to wit, on April 22, 1902, her husband, John Loftis, the defendant in error herein, brought an action in the court of common pleas of Stark county, Ohio, against the plaintiff in error, the Pennsylvania Company, to recover damages for the loss of the services of his said wife, Catharine Loftis, and to recover for doctor bills incurred and paid by him for her in consequence of the injuries sustained by her in said accident. The petition filed by him in said action contained the following averments with respect to the contract to carry, alleged to have been made by the Pennsylvania Company with said Catharine Loftis, to wit: "On or about the 8th day of May, 1898, one Catharine Loftis, then and now the wife of this plaintiff, entered into a contract with the defendant, whereby the defendant, in consideration of the sum of two dollars (\$2.00), to it paid, thereby agreed to accept said Catharine Loftis as a passenger on its cars, and convey her as such passenger the entire distance from the city of Alliance, Ohio, to the city of Columbus, Ohio, and return, over the lines of the defendant, the Pennsylvania Company, and said Catharine Loftis was to be conveyed the entire route in the cars of the defendant without any change of cars whatever. On or about the 8th day of May, 1898, in pursuance of said contract, said Catharine Loftis purchased and paid the defendant for a ticket for the entire trip from Alliance, Ohio, to Columbus, Ohio, and return, over the defendant's lines, and on said date Catharine Loftis took pas-

Pennsylvania Co. v. Loftis

sage in defendant's cars as designated by the defendant for the purpose of said trip, and the defendant thereupon undertook to convey plaintiff from said city of Alliance to said city of Columbus and return in its cars, and over its lines." For answer, the Pennsylvania Company, after admitting its corporate capacity and that it was a common carrier of passengers, denied each and every other allegation in plaintiff's petition contained. The case was submitted to a jury, and resulted in a verdict and judgment in favor of the plaintiff, John Loftis, for \$300. This judgment was affirmed by the circuit court. To reverse this judgment of affirmance the Pennsylvania Company prosecutes error.

Carey & Mullins and C. C. Bow, for plaintiff in error.

Craine & Snyder, for defendant in error.

CREW, J. (after stating the facts). The two principal contentions of the plaintiff in error in this case are: (1) That it was not shown by competent evidence that there was any contract or undertaking on the part of the Pennsylvania Company to become responsible for the transportation of Catharine Loftis beyond the terminus of its own line, and therefore that it is not liable for the injury received by her through the default or negligence of the Cleveland, Akron & Columbus Railway, a connecting line. (2) That the court of common pleas erred in refusing to give to the jury certain instructions requested by counsel for the railway company. If counsel for plaintiff in error are right as to either of these contentions, it follows that the judgment of the circuit court was wrong, and should be reversed. As to the first of the above propositions, counsel would seem to rest their claim upon the assumption that the coupon ticket issued to Catharine Loftis by the Pennsylvania Company was and is itself the only proper evidence in this case of any undertaking or agreement on its part to receive and carry said Catharine Loftis as a passenger from Alliance to Columbus and return, and that, therefore, as a common carrier, it is not shown to have assumed towards her any other or different duty or obligation than such as the sale of said ticket would itself imply. As to a common carrier of passengers, as distinguished from a carrier of goods or baggage, the doctrine would seem now to be generally well settled that the mere issuance and sale by the former of a coupon ticket good over its own and connecting lines does not of itself import an undertaking or agreement on the part of the issuing or selling company to become responsible for the safe carriage of the passenger to whom such ticket is sold beyond its own line. Yet it is equally true, and not less well settled, we think, that a railway company selling a ticket for the transportation of a passenger beyond its own line of road may, by contract, either express or implied, make itself responsible for the safe carriage of such passenger over the entire route

Pennsylvania Co. v. Loftis

covered by the ticket sold. Hutchinson on Carriers, §§ 577, 578; 4 Elliott on Railroads, § 1596; Young v. Pennsylvania Railroad Co., 115 Pa. 112, 7 Atl. 741; Pennsylvania Railroad Co. v. Connell, 112 Ill. 295, 54 Am. Rep. 238; Hartan v. Eastern Railroad Co., 114 Mass. 44; Pennsylvania Railroad Co. v. Jones, 155 U. S. 333, 15 Sup. Ct. 136, 39 L. Ed. 176; Van. Buskirk v. Roberts, 31 N. Y. 661; 3 Thompson on Negligence, § 3352. And where, as in this case, the scope and extent of the contract made or the duty and obligation assumed by the railway company is a fact in issue, the ticket sold is not itself the only evidence that may be introduced and considered upon such issue, but the fact may be shown or proved by any competent parol testimony. In the present case it was alleged by plaintiff in his petition that the Pennsylvania Company, "in consideration of the sum of two dollars to it paid, thereby agree to accept said Catharine Loftis as a passenger in its cars and convey her as such passenger the entire distance from the city of Alliance, Ohio, to the city of Columbus, Ohio, and return, over the lines of the defendant, the Pennsylvania Company, and said Catharine Loftis was to be conveyed the entire route in the cars of the defendant without any change of cars whatever." As tending to prove the particular agreement and undertaking so alleged, evidence was introduced by plaintiff showing that some time prior to May 8, 1898, the Pennsylvania Company caused to be inserted in the Alliance Daily Leader, a newspaper published in the city of Alliance, the following advertisement: "Special Sunday excursion to Columbus via Pennsylvania Lines, May 8th, next Sunday. Two dollars round trip. Excursion tickets will be sold to Columbus from Alliance, via Pennsylvania Lines, special train leaving at 6:45 a. m. central time; returning, leave Columbus 6:30 p. m. All day to see the Capitol City. Ohio National Guards are camped at Columbus." The obvious purpose of this notice was to advise and inform the public that on the day and at the time named therein a special excursion train would be run from Alliance to Columbus and return over or "via" the Pennsylvania Lines, and that round-trip tickets would be sold by the Pennsylvania Company for said excursion good for the round trip. This notice came to the attention of Catharine Loftis, and the matter of said excursion was talked over by her with members of her family before she procured her ticket. This advertisement contained no information or notice that said excursion train would be run over any line other than the Pennsylvania Lines; and Catharine Loftis had no notice of any limitation on the responsibility of the Pennsylvania Company, or that said company would not be in entire charge and control of said excursion train from Alliance to Columbus and return. Evidence was also given showing that for the ticket sold to said Catharine Loftis a single charge was made for the entire trip, and that payment

Pennsylvania Co. v. Loftis

therefor was made to and received by the ticket agent of the Pennsylvania Company at its office in Alliance. It was further shown that this was a special excursion train, and, was made up when it left Alliance, was composed entirely of coaches belonging to the Pennsylvania Company, and that these coaches were intended to be and were run through from Alliance to Columbus without change. These with other facts and circumstances proven in this case, while not of themselves conclusive upon the question of the contract made or obligation and duty assumed by the Pennsylvania Company, were, nevertheless, we think, competent to be given in evidence as bearing upon that question, and as tending to show on its part an entire contract or undertaking to carry from Alliance to Columbus and return. Being competent as evidence, their probate force, and the weight and effect to be given them, in the light of all the facts and circumstances proven, was a question to be determined by the jury under proper instructions from the court.

2. On the trial of this cause in the court of common pleas counsel for the railway company submitted to the court certain requests to charge, among which were the following: "(1) A railroad company which sells a coupon ticket over its own and connecting line is presumed, in the absence of evidence to the contrary, to act as the agent for the connecting line, and is not liable to the purchaser of such ticket for injuries sustained by reason of the negligence of such connecting line. (2) If the jury find that in selling plaintiff's wife a ticket to Columbus and return—if they do find that such a ticket was sold—the defendant was acting as agent for the Cleveland, Akron & Columbus Railway Company so far as passage over that road was concerned, the plaintiff cannot recover in this action. (3) The fact that the defendant at the time it sold plaintiff's wife her ticket to Columbus (if the jury find that it did sell such ticket) had collected fare for the entire distance, is not, of itself, sufficient to warrant the jury in finding that defendant had contracted to carry the plaintiff's wife any further than the end of its own line, which the testimony shows was at Orrville." These requests were all of them pertinent to the issues involved, and each correctly states the rule of law applicable to the particular state of facts to which it was intended to apply. They should therefore have been given to the jury. As hereinbefore stated, the sale by a railroad company of a coupon ticket containing coupons entitling the person to whom it is sold to transportation as a passenger over a connecting, but independent, line, does not necessarily import a contract or undertaking on the part of the company selling such ticket to become responsible for the safe carriage of such passenger for the entire distance, or beyond its own line, even though such ticket contains no express provision limiting the liability of the company issuing or selling the same to its own line of

West v. St. Louis Southwestern Ry. Co

road. Unless the contrary appears, the presumption is that a railway company selling such coupon ticket over connecting, but independent, lines, in making such sale acts as the agent of the connecting line in the sale of the coupons, and said coupons are regarded as in the nature of separate tickets on behalf of the connecting carriers, and binding upon them in the same manner as if issued or sold by themselves; and in the absence of evidence showing a different undertaking or obligation each will be responsible only for the safe carriage of the passenger over its own line. The above instructions asked by the railway company merely called for the application of these rules of law to facts which there was evidence in the case tending to prove or establish, and we think, therefore, the trial court erred in refusing to give them. Other special requests were submitted by counsel for the railway company, but these, we think, were either properly refused or covered by the general charge. The refusal of the court of common pleas to give to the jury the requests above designated being one of the errors assigned by the railway company in the circuit court, that court erred in affirming the judgment of said court of common pleas. The judgment of the circuit court in this case will therefore be reversed.

Judgment reversed.

DAVIS, C. J., and SHAUCK, PRICE, and SUMMERS, JJ., concur.

WEST v. ST. LOUIS SOUTHWESTERN RY. CO.

(Supreme Court of Missouri, Division No. 1, Feb. 15, 1905.)

[86 S. W. Rep. 140.]

Injury to Passenger—Miscarriage—Negligence—Absence of Suitable Means of Alighting—Jumping from Car by Direction of Switchman.*

Plaintiff, a passenger, was carried beyond her station, when the conductor directed her to step out on a flat car, and she was taken back by that means. On arriving at the station the switchman in charge assured plaintiff that there was no means of alighting except for her to jump, and assisted her to the ground. As a result of her thus alighting plaintiff suffered a miscarriage: *held*, that there was negligence by de-

*As to the duties of a carrier of passengers with respect to the safety of stations, platforms and other stopping places, see foot-notes appended to *Lauterer v. Manhattan Ry. Co.* (C. C. A.), 13 R. R. R. 295, 36 Am. & Eng. R. Cas., N. S., 295; foot-notes appended to *Newcomb v. New York Cent., etc., R. Co.* (Mo.), 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10; *Lemon v. Grand Rapids & I. Ry. Co.* (Mich.), 12 R. R. R. 853, 35 Am. & Eng. R. Cas., N. S., 853; foot-note appended to *Matthieson v. Burlington, etc., Ry. Co.* (Iowa), 12 R. R. R. 826, 35 Am. & Eng. R. Cas., N. S., 826; foot-notes appended to *Ellis v. Chicago, etc., Ry. Co.* (Wis.), 12 R. R. R. 122, 35 Am. & Eng. R. Cas., N. S., 122; foot-notes appended to *Lehigh Valley R. Co. v. Dupont* (C. C. A.), 12 R. R. R. 83, 35 Am. & Eng. R. Cas., N. S., 83.

As to the care due alighting passengers, see foot-notes appended to

West v. St. Louis Southwestern Ry. Co

defendant in placing plaintiff in so dangerous a position without other means of alighting, though the switchman rendered what assistance he could.

Contributory Negligence.

Plaintiff was not guilty of contributory negligence in not informing the switchman of her condition.

Damages—Instruction.

In an action by a passenger who suffered a miscarriage as the result of her injuries, the court instructed that, if plaintiff was entitled to recover, to give her such damages as she was shown to have sustained, and in estimating them to consider the character and extent of her injuries, the fact that they were permanent, together with the physical pain and mental anguish suffered: *held*, not a "roving commission to the jury to establish their own standard of damages," but to relate only to the ill health and suffering in consequence of the miscarriage alleged in the petition.

Instructions.

A judgment will not be reversed for instructions too favorable to appellant.

Remarks of Counsel.

In an action for injuries to a passenger, remarks of counsel for plaintiff to the effect that defendant's servants would have handled a car load of steers with more care than they did plaintiff were not ground for reversal.

Appeal from Circuit Court, Dunklin County; J. L. Fort, Judge.

Action for personal injuries by Fannie E. West against the St. Louis Southwestern Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

S. H. West and W. H. Miller, for appellant.
Ely & Kelso, for respondent.

VALLIANT, J. Plaintiff was injured in alighting from a car on defendant's road, and sued to recover damages, alleging that the injury was the result of defendant's negligence.

The plaintiff's evidence tends to prove as follows: Plaintiff, a married woman, living at Pascola, in Pemiscot county, on December 16, 1900, left home to pay a visit to a sister, who lived five miles from Morehouse, in New Madrid county. Her route was over the St. Louis, Kennett & Southern Railway to Campbell, thence over the defendant's railroad to Birds Point, thence by the Iron Mountain Railroad to Morehouse, thence in a hand car five miles to the end of her journey. She carried with her her baby and a daughter about 13 years old. She bought tickets at Campbell,

Reagan v. St. Louis Transit Co. (Mo.), 13 R. R. R. 688, 36 Am. & Eng. R. Cas., N. S., 688; McDonald v. City Electric Ry. Co. (Mich.), 12 R. R. R. 436, 35 Am. & Eng. R. Cas., N. S., 436; foot-note appended to Ellis v. Chicago, etc., Ry. Co. (Wis.), 12 R. R. R. 122, 35 Am. & Eng. R. Cas., N. S., 122; Rutledge v. New Orleans & N. E. R. Co. (C. C. A.), 11 R. R. R. 488, 34 Am. & Eng. R. Cas., N. S., 488; foot-note appended to Mead v. Boston Elevated Ry. Co. (Mass.), 11 R. R. R. 13, 34 Am. & Eng. R. Cas., N. S., 13; foot-notes appended to Norfolk & A. Terminal Co. v. Morris' Adm'r (Va.), 9 R. R. R. 165, 32 Am. & Eng. R. Cas., N. S., 165.

took passage on defendant's train, and was carried to Birds Point, which is on the Missouri side of the Mississippi river opposite Cairo, Ill. At Birds Point the defendant's track leads down to the river and connects with a ferry or transfer boat. Cars are delivered by defendant on the boat, and are ferried across the river. When she boarded defendant's train the plaintiff informed the conductor that she was to get off at Birds Point to take the Iron Mountain train for Morehouse. But when the train reached Birds Point it either did not stop, or else the station was not announced, and the plaintiff was carried past the station, the train going on to the river, a distance of about 1,000 feet, to deliver the cars on the boat. The plaintiff, seeing that she was being carried beyond the station, called to the conductor, and asked him to back the train to the station to let her get off, but the conductor told her to keep her seat in the car, and he would send her back to the station. The train went on to the river, and the car in which the plaintiff was riding was delivered into the ferry-boat. Then the conductor came to her, and, taking her hand baggage, and requesting her to follow, led her out across the platform of the car onto what was called a "tow car" attached to the engine, and, pointing to a man on the car, said to her "This man will take you back or help you off." This tow car was not designed for passengers. Its purpose was to go between the engine and the car to be delivered on the boat so as to avoid the engine getting on the boat. It was used also to carry tools and the trainmen rode on it. It was an open flat car, without any passenger accommodations whatever, though there were benches for the crew. The conductor left the plaintiff and her children on this tow car, and they were carried back to the station. On arriving there, one of the train crew told the plaintiff that he was ready to help her off. She asked how she was to get off, and was told that she would have to jump. It was about five feet from the floor of the car to the ground. The children were taken down safely by the men. The plaintiff again asked if there was not some other way for her to get down, and was told that there was no way but to jump. She was also told that the engine was ready to go on to the yards, and she must get down. Under those conditions she gave her hands to one of the men, who stood on the ground, who in that way helped her, and with that assistance she jumped to the ground. There was on the side of the car, under the edge of the floor, but out of sight to one standing on the floor of the car, an iron appliance called a "stirrup," by means of which switchmen or others who worked on the car could climb on or off. There was also along the sides of the floor of the car an iron railing about a foot high. On alighting the plaintiff went to a hotel near the depot, where she waited until the Iron Mountain train came—three or four hours. When she got to the hotel she was sick with nausea

and swimming in the head, and was sick on the route from Birds Point to Morehouse, where she arrived that evening, which was Sunday; was sick at Morehouse; cut her visit short on that account, and returned home on Tuesday, her sister accompanying her for that reason. After arriving at home on the evening of December 18th her illness became serious, but she did not call a physician until, December 29th, she suffered a miscarriage; has been in ill health ever since, and was suffering at the trial. At the close of the plaintiff's evidence the defendant asked an instruction looking to a nonsuit, which the court refused, and defendant excepted.

The evidence on the part of the defendant tended to prove as follows: "The employees of the railroad company testified with one accord that the plaintiff was carefully handled; that she did not jump, that she did not fall, and that no one was hurt in alighting from the car; that she climbed down the steps as other passengers climbed down; that no complaint was made either by them or to any one else of being hurt." They testified that the plaintiff did not jump off or fall off, but, on the contrary, was "helped off." One of them (Nance) said she came down the steps face front, as any other lady or child would, the switchman holding her hands. Another one (Henikin) said it was he who helped her, and that she came down backwards; he supporting her by holding her under the arms. The testimony also tended to show that the plaintiff did not inform any of the railroad employees that she was pregnant.

At the request of the plaintiff the court instructed the jury that, if they should find for the plaintiff, they should "assess her damages at such sum, not exceeding ten thousand dollars, as from the evidence you may believe will be just and fair compensation to her for the injuries, if any, which she is shown by the evidence to have sustained. And in estimating such damages you should take into consideration the character and extent of her injuries; the fact, if you so find from the evidence, that they are permanent; together with the physical pain and mental anguish she has suffered in consequence thereof."

At the request of the defendant the court gave the following instructions: "(1) The court instructs the jury that the plaintiff, by her petition as amended, bases her right to recover in this case on the gross negligence of the defendant, by its servants and employees, in assisting her to alight and jump from the rear end of the guide car of defendant to the ground, a distance of about five feet, by reason of which negligence she was injured. Now, in this connection you are instructed that the burden of proving these facts is on the plaintiff, and, unless you find she has done so by a preponderance of the evidence, your verdict must be for the defendant. (2) The court instructs the jury that if, from the evidence, you find and believe that on the 16th day of December, 1900,

West v. St. Louis Southwestern Ry. Co

plaintiff, Fannie E. West, did alight from defendant's car either by being helped or by jumping by assistance of an employee, and was injured in so doing, yet your verdict must be for the defendant, unless you further find that defendant's agents were negligent in assisting her to alight, if you find she was assisted, and that such negligence was the direct cause of the injury. (4) The court instructs you that if you find and believe from the evidence that plaintiff was assisted in alighting from defendant's car, and sustained injuries thereby, resulting in a miscarriage, yet plaintiff cannot recover unless defendant's agents, servants, and employees were negligent in the assistance rendered; and in determining whether or not they were negligent you should consider all the surrounding circumstances, and the fact, if it was a fact, that she was pregnant, should not be considered by you in determining the question of negligence, unless you believe from the evidence that they knew of such pregnancy. (5) The court instructs the jury that the fact that plaintiff was carried past the station house at Birds Point, and was put on a tow car and returned thereto, should not be considered by you in arriving at your verdict. Her right to recover, if at all, is confined solely to the act of alighting from the tow car, and the manner of assistance rendered, and injuries, if any, flowing directly therefrom. (6) The court instructs the jury as a matter of law that it is dangerous and unsafe for a lady in a state of pregnancy to jump, either by assistance or alone, from the end of a flat car, a distance of four or five feet, onto a hard surface, and that such danger is apparent to every prudent and careful person; and if you find from the evidence that plaintiff was in a state of pregnancy, and did so jump or alight from said car, and did sustain the injuries complained of, yet she cannot recover in this case unless you believe defendant's employees were negligent in rendering her assistance; and unless you so find your verdict must be for defendant. (7) The court instructs the jury that, should you find the issue in this case for the plaintiff, yet you are directed that it was her duty, immediately upon ascertaining that she had sustained injuries, to procure medical aid, and to do what a prudent and careful person would under like circumstances and surroundings have done to alleviate and protect herself against her threatened result; and if you believe that she failed so to do, and that by reason of such failure her injuries were intensified and aggravated, then for such aggravation she cannot recover, and you should take her conduct into consideration in arriving at a verdict." The defendant also requested the following, which the court refused: "(3) The court instructs the jury that if, from the evidence, you find that plaintiff jumped from the car, then your verdict must be for the defendant."

In his argument to the jury plaintiff's counsel said that the railroad company would have handled a car load of steers

with more care than they handled this lady, to which remark the defendant took exception.

There was a verdict for the plaintiff for \$5,000, and judgment accordingly, from which this appeal was taken.

1. Appellant insists that the instruction looking to a non-suit should have been given. This instruction is based chiefly on two propositions: First, that whereas, as appellant contends, the amended petition specifies the negligence of defendant's servants to have consisted only in the act of assisting plaintiff to alight from the car, the evidence shows no negligence in the manner in which that act was performed; and, second, the plaintiff knew her condition as to pregnancy, knew it was dangerous for her in that condition to jump, yet, without disclosing the fact to the defendant's servants, took the risk and jumped, and therefore it was her own negligence. The language of the petition, after stating the facts of the plaintiff's being carried beyond the station and brought back on the tow car, and the inconvenient conditions surrounding her, is: "It became necessary for defendant's agents, servants, and employees to assist and aid plaintiff in alighting from the rear platform of said guide car [it is so called in the petition] to the ground, a distance of about five feet; that defendant's agents, servants, and employees carelessly, recklessly, and negligently assisted plaintiff from said guide car, and directed and required plaintiff to jump from said guide car, as aforesaid, in assisting her to alight from said guide car; and in consequence of said careless and negligent assistance in alighting and jumping from said guide car to the ground, without any fault or negligence on her part, plaintiff was thrown suddenly and violently against said defendant's roadbed, and received great bodily harm and injuries." The argument for appellant assumes that the plaintiff was on this tow car (as it is called by defendant) or guide car (as it is called in the petition) of her own will, and that the manner of her descent therefrom was a matter of her own concern, in which no responsibility rested on the railroad company; that, she having elected to jump, one of the train crew courteously took her hands in his, and held them, to break the force of the jar in alighting on the ground, and that in so doing he did nothing that he ought not to have done, and, in so far as the act itself was concerned did it well. The plaintiff's petition is criticised also for containing recitals of the facts which accounted for the plaintiff's position on the tow car at that time, the criticism being that those facts had nothing to do with the case, and were injected into it to prejudice the jury against the defendant. But that criticism is not deserved, and the argument based on it is not sound. Those recitals were necessary to account for her presence on that tow car. The plaintiff was not there of her own will; she was not there by choice; she was there by the failure of the railroad company to perform its duty to her as a passen-

ger—its failure to stop the train at the passenger station when it arrived at Birds Point, or failure to let her know it had arrived; its failure, after it had carried her past the station, to make amends for the wrong by sending her back in a suitable carriage or car. It is true no violence was used to force her to go on the tow car, yet, under the circumstances, it was coercion. The car in which she had taken passage was carried down the incline on the river bank and landed in a ferryboat. The conductor then came and told her to follow him, and he would send her back. She followed him, and he led her onto this tow car, and left her in the care of one of the train crew. What was to be expected, in the way of resistance, of a woman with a baby in her arms and a 13 year old girl child with her, under those circumstances? What could she do but obey? Then when they arrived at or near the station in the tow car, and she asked for means to alight, and was told to jump, what else could she do? They told her, according to the testimony, that the engine had to go to the yards, and they could not wait; that she must jump; and she did so. In so doing she yielded, if not to immediate physical force, at least to imperilous environments, for which the defendant alone was to blame. It may be true that when the act of jumping came the man who gave her a helping hand did all that could have been done in that kind of assistance, but she was entitled to more assistance than that. She was entitled to every appliance which the circumstances of the case rendered necessary to secure her safe descent, and which, by the exercise of a very high degree of care and prudence, the defendant could then and there have produced. There was evidence, therefore, from which the jury could justly conclude that the defendant's servants were negligent in the matter of assisting the plaintiff to alight.

The second point on which appellant thinks the court should have given the instruction for a nonsuit is that the plaintiff, knowing her condition as to pregnancy, and knowing it was dangerous to jump, was guilty of contributory negligence in doing so. A good deal of what we have said in reference to the first point applies to this also. The plaintiff did not jump of her own accord. The most that can be said of her free will is that she had a choice of perils. She could remain on the tow car, and be carried to the switchyards, or whither she knew not, or she could avail herself of the only assistance offered—the outstretched hands of the switchman—and jump, and she chose the latter. It is said in the brief of the learned counsel that the plaintiff did not tell employees of the defendant that she was pregnant, and they did not, therefore, know the extra peril, from that cause, that might result from jumping from the car. Of course, they did not know that fact; but they knew, if they had the common knowledge of men, that it was dangerous for a woman, a mother, to jump from a height of five feet

to the hard surface of the railroad track. The law did not demand of the plaintiff, as she stood on the floor of that tow car asking the defendant's servants to furnish her means to alight, to tell them that she was in the condition of an expecting mother, and therefore afraid to jump. Besides, according to her testimony—which they did not deny—they had already told her that there was no other way of descent but to jump. The court was justified in refusing the instruction looking to a nonsuit.

2. It is complained that the instruction given on the measure of damages is erroneous, in that it is not limited to the injuries specified in the petition, but "which she is shown by the evidence to have sustained"; also that it authorizes them to consider if the injuries are permanent. The language of the instruction following that about quoted is: "And in estimating such damages you should take into consideration the character and extent of her injuries; the fact, if you so find from the evidence, that they were permanent; together with the physical pain and mental anguish she has suffered in consequence thereof." The criticism is that it is a roving commission to the jury to establish their own standard of damages. The instruction is not amenable to that criticism. *Hawes v. K. C. Stock Yards*, 103 Mo. 60, 15 S. W. 751; *Badgley v. St. Louis*, 149 Mo. 122, 50 S. W. 817. The evidence as to the plaintiff's injuries related only to injuries of the character specified in the petition, to wit, the miscarriage, and the ill health and suffering consequent. The instruction limited the jury's consideration to injuries shown by the evidence. It is argued that there was no evidence of permanent injury or of mental anguish. Perhaps it is true that no expert gave the scientific opinion that the plaintiff's injuries were permanent, and that no mention of mental anguish is made in the evidence. But in a case of this particular kind a jury's good common sense is to be relied on. The trial occurred nearly a year after the injury. The plaintiff testified that she had been an invalid ever since, and was then suffering, specifying certain trouble incident to women who have had such misfortune. The court did not err in authorizing the jury to consider if the injury was permanent, and to consider not only the physical, but also the mental, pain. The jury did not abuse the power given them. Their award was conservative.

3. The instructions given at the request of the defendant were more favorable to it than the law warranted. The first and second of those instructions are liable to be interpreted as meaning that the only question of negligence was as to the manner in which the man who held the plaintiff's hand while she jumped performed that act. That was, perhaps, not what the court intended, and was evidently not the meaning the jury gave them, but it was the meaning the defendant intended, as we judge from the argument of its learned counsel.

West v. St. Louis Southwestern Ry. Co

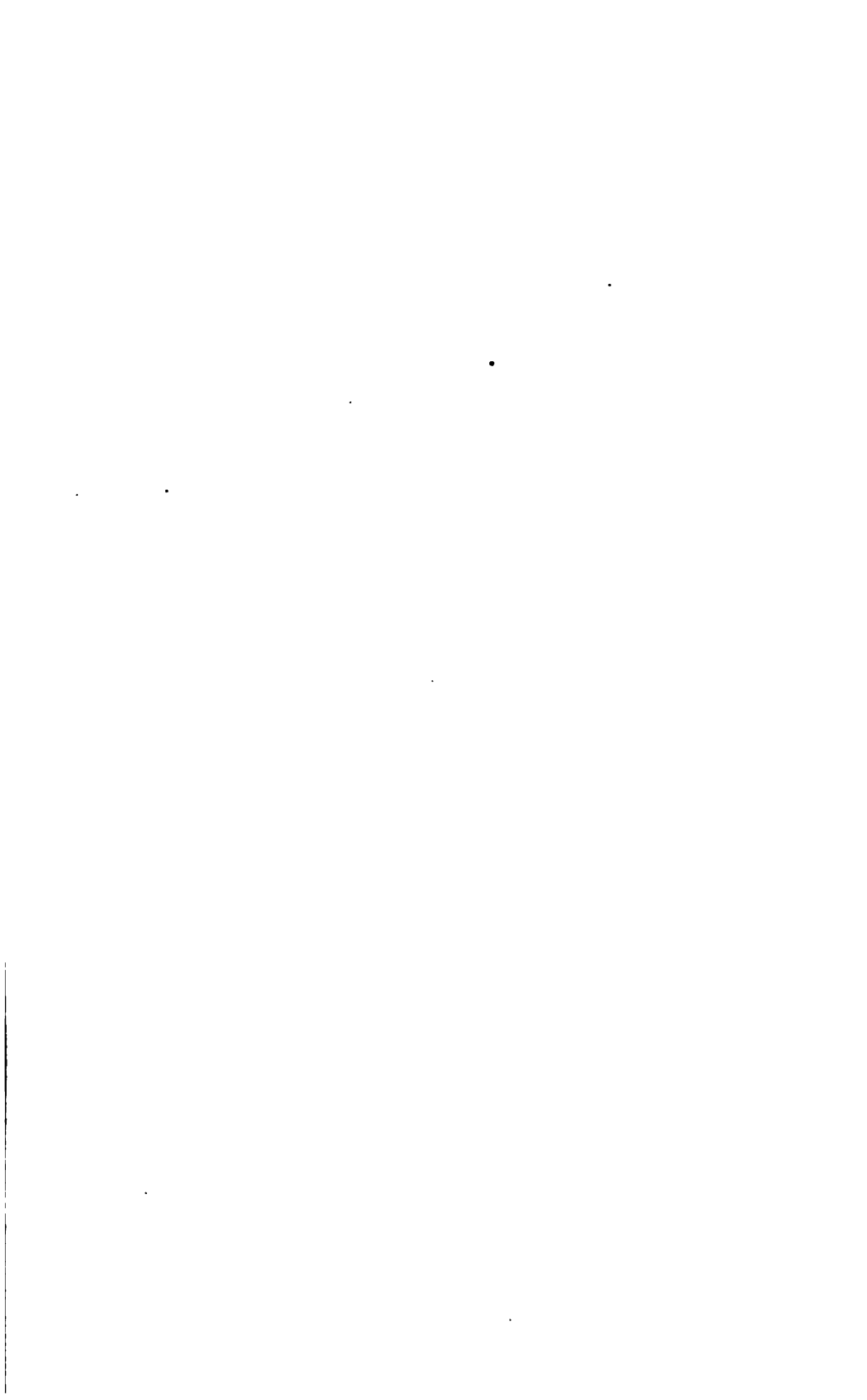
The third instruction the court very properly refused, because it was equivalent to a peremptory direction to find for the defendant. The fourth directs the jury not to consider the fact of miscarriage, unless they should find that the defendant's servants knew the plaintiff was pregnant. The fifth tells the jury that they are not to consider the fact that the plaintiff was carried past the station at Birds Point, as that had nothing to do with the case. In the sixth instruction the court, as a matter of law, tells the jury that it was dangerous for a pregnant woman to jump from the car at a height of five feet, either with or without assistance, and, if this plaintiff did so, then she cannot recover, unless the servants of defendant were negligent in the act of rendering her assistance. The instruction is inconsistent in itself. If it was negligence per se to jump under the circumstances, assistance or no assistance, then there was left no question of defendant's negligence in the case. The seventh instruction would lead the jury off into a realm of conjecture as to what the plaintiff's condition would have been if she had obtained the services of a physician sooner. Suppose she had called a physician as soon as she felt ill, and he had made a mistake in the case, and by mistreatment had increased the trouble, on which side of the account would the law as declared in that instruction have placed the damage? None of those instructions meet our approval, but we refer to them only to observe that, so far as they go, they were more favorable to defendant than the law authorized.

4. The remark of the plaintiff's attorney in his argument to the jury to the effect that the defendant's servants would have handled a car load of steers with more care than they did this plaintiff was a mere rhetorical flourish, which was not beyond the limit of forensic debate.

We find no error in the record of which the defendant has any cause to complain.

The judgment is affirmed.

BRACE, P. J., and LAMM, J., concur. MARSHALL, J., not sitting.



INDEX TO NOTES.

ABATEMENT.

See NUISANCES.

ABSENCE OF LEGISLATIVE REQUIREMENT.

See NUISANCES.

ABSENCE OF NEGLIGENCE.

See NUISANCES.

ABSENCE OF PHYSICAL INVASION.

See NUISANCES.

ABUTMENTS IN STREETS.

See NUISANCES.

ABUTTERS.

See NUISANCES.

ACCESS.

See NUISANCES.

ADDITIONAL RAILS.

See NUISANCES.

AIR.

See NUISANCES.

ANNOYANCE.

See NUISANCES.

ASSESSMENT OF DAMAGES.

See NUISANCES.

AUTHORITY MUST BE CLEAR.

See NUISANCES.

BALLAST.

See NUISANCES.

BAWDY HOUSES.

See NUISANCES.

BELLS.

See NUISANCES.

BLACKSMITH SHOP.

See NUISANCES.

BRIDGES.

See NUISANCES.

CANALS.

See NUISANCES.

CAR BARN.

See NUISANCES.

CAREFULNESS.

See NUISANCES.

CARRIERS.

See NUISANCES.

CEMETERIES.

See NUISANCES.

CHANGE OF GRADE.

See NUISANCES.

CHARACTER NOT SPECIFIED.

See NUISANCES.

CHARTERS.

See NUISANCES.

CHEAPNESS.

See NUISANCES.

CHURCHES.

See NUISANCES.

CINDERS.

See NUISANCES.

COAL BINS.

See NUISANCES.

COAL HOISTS.

See NUISANCES.

COAL SHEDS.

See NUISANCES.

COMMON LAW.

See NUISANCES.

COMPENSATION.

See NUISANCES.

CONCOMITANTS OF FRANCHISE.

See NUISANCES.

CONFORMITY TO LAW.

See NUISANCES.

CONSEQUENTIAL DAMAGES.

See NUISANCES.

CONSEQUENTIAL INJURIES.

See NUISANCES.

CONSTITUTIONAL LAW.

See NUISANCES.

CORPORATIONS.

See NUISANCES.

CROSSINGS.

See NUISANCES.

CROSSINGS OF RAILROADS.

See NUISANCES.

CROSS-OVER SWITCH.

See NUISANCES.

DAMAGES.

See NUISANCES.

DAMS.

See NUISANCES.

DANGEROUS MATERIALS.

See NUISANCES.

DEBRIS.

See NUISANCES.

DEPOTS.

See NUISANCES.

DISCOMFORT.

See NUISANCES.

DISTILLERIES.

See NUISANCES.

DISTURBING DIVINE WORSHIP.

See NUISANCES.

DIVERSION OF SURFACE WATER.

See NUISANCES.

DIVERSION OF WATERCOURSES.

See NUISANCES.

DIVINE SERVICE.

See NUISANCES.

DOCKS.

See NUISANCES.

ELEVATED RAILWAY POSTS.

See NUISANCES.

ELEVATED RAILWAYS.

See NUISANCES.

EMBANKMENTS.

See NUISANCES.

EMINENT DOMAIN.

See NUISANCES.

ENGINE HOUSES.

See NUISANCES.

ENGINES.

See NUISANCES.

EQUITIES CONSIDERED.

See NUISANCES.

EXCAVATIONS.

See NUISANCES.

EXCESSIVE USE.

See NUISANCES.

EXCLUSIVE CONTROL OVER STREETS.

See NUISANCES.

EXERCISE OF SKILL AND CARE.

See NUISANCES.

FACTORIES.

See NUISANCES.

FEDERAL GOVERNMENT.

See NUISANCES.

FERRIES.

See NUISANCES.

FERTILIZERS.

See NUISANCES.

FLOODING LAND.

See NUISANCES.

FREIGHT.

See NUISANCES.

FRIGHTENING TEAMS.

See NUISANCES.

FURNACES.

See NUISANCES.

GOOD FAITH.

See NUISANCES.

GRADING STREETS.

See NUISANCES.

GRANTS.

See NUISANCES.

HEALTH.

See NUISANCES.

HIGHWAYS.

See NUISANCES.

HORSE RAILWAYS.

See NUISANCES.

HORSES.

See NUISANCES.

HYDRANTS.

See NUISANCES.

IMPLIED AUTHORITY.

See NUISANCES.

IMPROPER USE.

See NUISANCES.

IMPROVEMENT OF NAVIGATION.

See NUISANCES.

INCIDENTAL INJURIES.

See NUISANCES.

INCONVENIENCE.

See NUISANCES.

INCORPOREAL HEREDITAMENTS.

See NUISANCES.

INCORPOREAL RIGHTS.

See NUISANCES.

INDICTMENTS.

See NUISANCES.

INGRESS AND EGRESS.

See NUISANCES.

INJUNCTIONS.

See NUISANCES.

"INJURED."

See NUISANCES.

INJURIES TO PROPERTY.

See NUISANCES.

INSURANCE.

See NUISANCES.

LATERAL SUPPORT.

See NUISANCES.

LAWFUL BUSINESS.

See NUISANCES.

LAWFULNESS OF BUSINESS.

See NUISANCES.

LEGISLATIVE AUTHORITY MUST BE CLEAR.

See NUISANCES.

LEGISLATIVE INTENTION.

See NUISANCES.

LEGISLATIVE REQUIREMENTS.

See NUISANCES.

LEGISLATIVE SANCTION.

See NUISANCES.

LEVEES.

See NUISANCES.

LICENSEES.

See NUISANCES.

LICENSES.

See NUISANCES.

LIGHT.

See NUISANCES.

LIGHTNING.

See NUISANCES.

LOADING CARS.

See NUISANCES.

LOCATION DESIGNATED.

See NUISANCES.

LOCATION NOT DESIGNATED.

See NUISANCES.

LOT OWNERS.

See NUISANCES.

LOWER PROPRIETORS.

See NUISANCES.

MALODOROUS FREIGHT.

See NUISANCES.

MANUFACTORIES.

See NUISANCES.

MATERIAL INJURIES.

See NUISANCES.

MATERIALS.

See NUISANCES.

MILL SITES.

See NUISANCES.

MINING DEBRIS.

See NUISANCES.

MUNICIPAL CORPORATIONS.

See NUISANCES.

MUNICIPAL LICENSES.

See NUISANCES.

MUNICIPAL POWERS.

See NUISANCES.

NARROW STREETS.

See NUISANCES.

NAVIGABLE WATER.

See NUISANCES.

NAVIGATION.

See NUISANCES.

NECESSARY CONCOMITANTS.

See NUISANCES.

NEGLIGENCE.

See NUISANCES.

NOISE.

See NUISANCES.

NOISE FROM RUNNING TRAINS.

See NUISANCES.

NOMINAL DAMAGES.

See NUISANCES.

NONABUTTING PROPERTY.

See NUISANCES.

NOT A TAKING.

See NUISANCES.

NUISANCES—EFFECT OF LEGISLATIVE SANCTION, LAWFULNESS OF BUSINESS AND EXERCISE OF SKILL AND CARE.

Consequential injuries from construction and operation of railroads on land other than streets, 567.

Damages Must Be Special.

Access to cemetery—injunction, 543.

Coal shed—noise—same injury sustained by others, 543.

Frightening teams—incidental injuries, 543.

General rule, 541.

Limitations of rule, 542.

Noise—case must be very special, 544.

Railroads—absence of special injuries, 542.

Smoke and cinders—all property in vicinity injured, 543.

Smoke—injuries to many others, 544.

Street railway—location on portion of street not designated, 542.

Telephone poles, 544.

Unauthorized occupation of street by railroad—right to enjoin, 542.

Effect of Legislative Sanction.

Act naturally resulting in injury to private property—compensation—legislative intention—presumption, 539.

All equities considered, 529.

Canal—flooding land—consequence of lawful act, 540.

Compensation—absence of legislative requirement, 527.

Compensation where injury not actionable at common law—absence of statutory provision, 529.

Confusion and noise—trains and cars—legislative authority no defense, 539.

Consequential damages—not a taking, 541.

Consequential damages recovered—work not subject to abatement, 529.

Corporations acting for private profit—compensation, 538.

Dam across navigable water—overflowing private land, 539.

Dam—flowing back upon private land—injunction, 539.

Dam to improve navigation—destruction of mill site, 528.

Discomfort to be endured for public good, 527.

In actions by state, abutment of elevated railway, 524.

In actions by state, authorized obstruction of public road, 525.

In actions by state, bawdy house, 525.

In actions by state, business conducted in proper manner and location designated, 525.

In actions by state, canal purchased from state, 525.

In actions by state, general rule, 523.

In actions by state, highways and other things over which public has control, 524.

In actions by state, illustrations, 525.

In actions by state, improper use of railroad in street, 525.

In actions by state, license to manufacture fertilizers, 525.

In actions by state, location and height of dam specified, 525.

In actions by state, municipal powers, 525.

In actions by state, other statements of general rule, 524.

In actions by state, railroads in streets, 524.

In actions by state, statute must be strictly construed, 525.

In actions by state, works of internal improvements transferred to private corporation, 525.

Injuries to private property, general rule, 536.

Injuries to private property, other statements of general rule, 537.

Injury necessarily resulting from proper construction—damages—absence of charter remedy, 539.

Levees—overflows—not a taking, 541.

NUISANCES, ETC.—Continued.

- Must be forfeiture of chartered rights or suit authorized by law, 527.
- Navigable stream—mining debris—injuries to lower proprietor—compensation—constitutional law, 540.
- No right of action where enjoyment of property not directly disturbed, 527.
- Noxious vapors—private as well as public nuisance, 540.
- Obstruction of street—liability limited by principles governing actions for negligence, 528.
- Operation of railroad—noise—legislative authority no defense, 540.
- Private nuisances, consequential damages—right creature of statute, 527.
- Private nuisances—general rule, 526.
- Private wrongs, 538.
- Property “injured”—construction of constitutional provision, 541.
- Public improvement—vessel prevented from entering dock, 528.
- Public work for federal government—liability of contractor, 528.
- Public work for private profit—corporation not vested with sovereign’s immunity, 538.
- Railroad engine house and repair shops located near church, 540.
- Railroads—smoke, noise and vibration—necessary concomitants of use of franchise distinguished from wrongs, 541.
- Ringing mill bell—subsequent legislative authority, 528.
- Sewers—discomfort—special injury, 538.
- Slaughter house—bar to injunction in advance, 529.
- Small nuisances may be authorized, 528.
- Special damages from public nuisance, 538.
- Steam engine—municipal license, 529.
- Steam engines and furnace—burden of proving compliance with statute, 529.
- Telephone wires—lightning—noise—extra insurance—injunction, 529.

Exercise of Care and Skill.

- Coal bins—necessary location—exercise of care—injunction, 585.
- Factory—noxious vapors, 585.
- General rule, 584.
- Lawful business—exercise of care no defense, 584.
- Smelting works—unwholesome gases—suitable location and proper operation, 585.
- Stock yards—location—good faith—exercise of care—injunction, 585.
- Use of dangerous materials, 585.

Lawful Business.

- Dense smoke for twelve hours twice a month, 583.
- Distillery—smoke and noise, 584.
- Evidence must be convincing, 584.
- General rule, 582.
- Illustrations, 582.
- Manufactory—subsequent erection of residence, 583.
- Offensive odors not producing disease, 583.
- Other statements of rule, 582.
- Slaughter house—noises, 583.
- Smoke—noise—odors not injurious to health—injunction, 583.
- Stable in city, 583.
- Steam whistles, 584.

Negligence or Want of Skill.

- General rule, 586.
- Illustrations, 586.
- Negligence in construction or operation of railroad—general rule, 586.
- Negligence in use of grant—damages—express legislative exemption, 586.

NUISANCES, ETC.—Continued.

- Obligation not to injure another—maxim applicable to railroad—negligence, 587.
- Overflow of water—negligent construction of railroad, 586.
- Railroad—injuries must be necessary result of proper construction and operation, 587.
- Sewers—percolation, 586.
- Terminal yard—improper construction or operation, 587.
- Watercourse—unnecessary diversion—cheaper construction—grant of railroad right of way, 587.

Railroads.

- Bridge—obstruction of stream, 570.
- Coal hoist near residence—annoyance and discomfort, 573.
- Consequential damages—absence of legislative requirement, 573.
- Consequential damages—additional compensation—legislative requirements, 574.
- Consequential injuries from construction and operation—common law, 573.
- Convenient transaction of lawful business—house rendered unfit for residence, 571.
- Dam constructed by county—maintenance by railroad—overflowing land, 570.
- Dam—unwholesome gases, 573.
- Diversion of surface water—careful construction of necessary ditch—overflowing land, 572.
- Diversion of watercourse, 568.
- Electric railway crossing steam railroad, 568.
- Elevated railroad on private land—rights of owner of land on opposite side of street, 567.
- Embankment—dwellings injured by pressure, 571.
- Embankment—ingress and egress prevented—damages—absence of legislative requirement, 574.
- Exercise of powers—conformity to private rights, 572.
- Incidental injuries to property not taken, 569.
- Injuries necessarily caused to nearby premises—noise, smoke and vibration, 569.
- Injuries necessarily resulting from construction and operation, 572.
- Injuries necessarily resulting from construction and operation—right to enjoin, 570.
- Land not taken—damages recoverable—constitutional provision, 573.
- Lateral support, 574.
- Light and air—obstruction, 568.
- Making up trains—injuries to dwellings—absence of negligence or abuse of franchise, 570.
- Noise—eminent domain—damages, 568.
- Nonabutting property—dust and smoke from coal chute—absence of negligence, 569.
- Nonabutting property—smoke and vibration, 569.
- Not made liable for consequential damages—powers not exceeded and absence of negligence, 576.
- Polluting pond—dumping offensive materials—remedy, 568.
- Restoration of highway—railroad as a public authority, 572.
- Running trains on highway—absence of negligence or excessive use, 570.
- Standing cars—malodorous freight—noises—vibration—absence of negligence or want of skill, 571.
- Standing trains—noise and smoke, 569.
- Stock yard—statute requiring freight to be received and carried promptly—proper location and absence of negligence, 575.
- Surface water—overflow caused by existence of railroad, 570.
- Unusual and unnecessary noises, 568.
- Use of highway—consequential injuries—absence of negligence, 570.

NUISANCES, ETC.—Continued.**Railroads in Streets.**

- Absence of negligence in operation, 546
- Abutter's interest in street—Ohio doctrine, 566.
- Access to nonabutting property rendered less convenient, 564.
- Appropriating street to other uses—encroaching on private property—compensation, 562.
- Authority to construct bridge—pier in street—right to enjoin, 564.
- Bridge over railroad—consequential injuries from construction, 564.
- Bridge over street with both abutments on railroad's land—exclusion of light and air only elements of damages, 551.
- Car barn—noises—proper location, 549.
- Change of grade—consequential injuries—not a taking, 560.
- Compensation not provided for—constitutionality of statute—mere consequential injuries from construction, 562.
- Compliance with statute and ordinances—absence of culpable negligence in operating, 548.
- Consequential injuries from construction—constitutional provision, 559.
- Consequential injuries from construction—depreciation in value of nonabutting property, 564.
- Consequential injuries from operation, general rule, 544.
- Consequential injuries from operation, other statements and illustrations, of general rule, 545.
- Construction and operation of two tracks under authority to construct only one, 555.
- Construction—failure to compensate—right to enjoin, 561.
- Construction—impairment of incorporeal rights a taking of abutting property, 566.
- Construction in cut—not a taking of abutting property—right to enjoin, 567.
- Construction—injuries indirectly resulting, 563.
- Construction—material injury to abutting property—compensation—injunction, 566.
- Construction—not a taking of private property—consequential injuries—right to enjoin, 563.
- Construction—not deprived of access to property, 562.
- Construction—obstruction—special injury, 561.
- Depot in street—not entitled to compensation, 561.
- Deprivation of ordinary enjoyment of property—compensation must be provided for, 557.
- Discomforts and inconveniences from construction, 559.
- Discomforts caused by passing trains—injured only in very special cases, 550.
- Disturbing divine worship—public interests paramount, 552.
- Disturbing divine worship—public nuisance—damages not recoverable, 550.
- Disturbing divine worship—railroad hydrant—necessity of railroad no defense, 553.
- Divine worship interrupted—answer held sufficient, 546.
- Egress interfered with—right to enjoin, 559.
- Electric railway—construction in narrow street—not a taking of abutting property—right to enjoin, 563.
- Electric railway—special injuries—right to enjoin construction, 559.
- Elevated railroad—compensation—injunction, 566.
- Elevated railway—noise—compensation, 548.
- Elevated railway posts—authorized location, 558.
- Embankment at crossing—travel obstructed and diverted—damages, 561.
- Excavation—embankment—lateral support—light—consequential damages from construction not included in award, 559.
- Excavations—necessary change of grade, 563.

NUISANCES, ETC.—Continued.

- Failure to ballast roadbed—ingress and egress not destroyed—absence of evidence of conditions of privilege, 561.
- Fee in public—compensation—absence of statutory requirement—injuries from operation to premises not taken, 546.
- Frightening teams—noise and smoke—injury not special, 551.
- Frightening teams—obstruction of access—overhead railroad, 551.
- Grading streets—doctrine equally applicable to construction of railroad, 565.
- Highway—diversion—widening—absence of charter authority—approval of town council—special injuries—damages, 567.
- Horse railway—proper construction, 560.
- Improper exercise of right to use street, 554.
- Incidental injuries from operation—private property for public use without compensation—rule reconciled with constitutional provision, 549.
- Incorporeal hereditaments—right of lot owners as inviolable as the property in the lots, 555.
- Ingress and egress—excessive use of street, 557.
- Ingress and egress interfered with by operation—municipal grant no defense, 556.
- Ingress and egress—light and air—necessary and unnecessary obstructions—special damages, 557.
- Ingress and egress—obstruction—unlawful or excessive use—street railway liable, 558.
- Ingress and egress—right abridged—property right taken, 562.
- Injuries from construction of railroads in streets, 558.
- Injuries from excavation—falling of soot and cinders upon property—damages recoverable, 554.
- Injuries from operation, authorities limiting application of general rule, 553.
- Injuries from operation—ingress and egress not interfered with, 553.
- Injuries from operation—mere absence of physical invasion no defense, 553.
- Injuries from operation—sufficient ingress and egress, 553.
- Lateral support—natural consequence of authorized act—no defense, 563.
- Location—discretion of directors—incidental annoyances, 552.
- Mere consequential annoyance from operation, 545.
- Mere consequential injuries from operation, 550.
- Mere incidental injuries from operation, 548.
- Mere obstruction of portion of street occupied by roadbed, 566.
- Mere proximity of railroad—diminution in value—damages not recoverable, 554.
- Necessary alteration in street surface—unnecessary obstruction, 562.
- Noise and smoke—ordinary use—cannot be a private nuisance, 551.
- Noise, smoke and fire—actual contact, 554.
- Noise, smoke and sparks—special damages, 557.
- Noise, smoke and vibration—special damage—constitutional provision, 556.
- Noise, smoke, vibration and unnecessarily obstructing, 547.
- Nominal damages not recoverable for injuries to abutters, 547.
- Obstructing street—cars standing too long, 553.
- Obstructing trains—damages recoverable for deprivation of ingress and egress, 555.
- Obstruction of access—necessary number of trains, 551.
- Only damages from obstruction of access, light and air recoverable, 556.
- Permanent damages recovered—injuries from operation not a nuisance, 558.
- Pollution of air—damages recoverable for depreciation in rental value—right to enjoin, 555.

NUISANCES, ETC.—Continued.

- Portion of street released to railroad—additional rail on ties—right to enjoin, 561.
- Proper construction and operation, 560.
- Proper construction—incidental injuries, 565.
- Property “damaged” by operation—constitutional provision, 553.
- Public not excluded from any part of street, 562.
- Railroad as public agent—location not inconsistent with public use, 560.
- Railroad on viaduct—injury to property on other side of street—noise, smoke and dust—absence of negligence, 552.
- Raising grade of street—powers of city conferred upon railroad, 565.
- Right to prevent construction, 565.
- Smoke and cinders—damages recoverable, 556.
- Smoke, vibration and standing cars—exercise of skill and care, 549.
- Special inconvenience and discomfort caused by operation, 555.
- Special injuries from construction—entitled to compensation, 559.
- Stagnant water—private as well as public nuisance, 560.
- Standing cars—malodorous freight—abuse of right not shown, 547.
- Street railway—construction—consequential injuries—not a taking of private property, 563.
- Street railway—location as little injurious as possible—abutter entitled to compensation, 566.
- Streets—exclusive control in city—injunction—compensation, 560.
- Temporary obstruction during construction—injuries peculiar to certain property, 565.
- Temporary obstructions by trains, 547.
- Terminals in city—operation—only least possible annoyance allowed, 557.
- Terminal yard—noise, smoke and vibration—necessary concomitants of franchise, 546.
- Track near sidewalk—inconvenience in using access to abutting property, 565.
- Turntable—injuries not incidental to usual operation, 555.
- Turntables—unreasonable construction and use, 557.
- Unauthorized construction of track on embankment—right of abutter to enjoin, 559.
- Unauthorized location—right of lot owner to enjoin, 565.
- Use of cross-over switch—special injuries, 554.
- Use of street unnecessarily injurious, 563.
- Usual noises, 548.

Railroads—Unauthorized Construction and Operation.

- Bridge over navigable river—departure from terms of federal grant, 577.
- Canal—unauthorized mode of construction, 577.
- Cross-over switch—location—approved plan not followed, 577.
- Diversion of stream—work of public utility, 576.
- General rule, 575.
- Grant—restriction for benefit of land retained—elevated railway—right to enjoin, 576.
- Illustrations, 576.
- Location unauthorized, 576.
- Operation of freight cars on street railway track without authority—injury to pedestrian, 576.
- Railroad in street, 576.
- Railroad in street—others injured, 577.
- Relocation of railroad, 576.
- Unauthorized uses by licensees, 576.
- Scope of note, 523.

Statutory Authority Must Be Clear.

- Cleaning and relighting engines—unreasonable use—injunction, 535.

NUISANCES, ETC.—Continued.

- Engine house and coal bins—soot and smoke—location not designated, 532.
- Engine house—compensation—general grant of authority—presumption, 534.
- General rule, 530.
- Illustrations, 531.
- License to operate steam engine in city—soot, 534.
- Limited use of land of another—Massachusetts mill act, 535.
- Location of round house—railroad acts in private capacity, 534.
- Mere authority to bring tracks within city—location of shop and engine house, 532.
- Municipal acts, 531.
- Municipal acts not contemplated by legislature, 536.
- Only right of way in street granted—location of terminal yard, 534.
- Other statements of general rule, 531.
- Public work for private profit—compensation—exemption—presumption, 531.
- Pumping station—selection of site left to city, 535.
- Railroad in highway—mere authority to construct—injury to private property, 531.
- Sewers—injuries to lower proprietor—authority not implied from act of parliament, 535.
- Station and hydrant located in street under mere authority to operate and maintain railroad in street, 536.
- Stationary steam engine—noise—vibration—license no bar to action, 535.
- Street railway—operation of stationary engine, 534.
- Switching—dangerous speed—standing trains—cinders, 534.
- Waterworks—injury from soot—site not approved, 531.
- Waterworks—soot—location and character not specified, 535.

Whether Damages from Construction and Operation of Railroad Were Included in Condemnation Assessment or in Consideration.

- Damages included—bridge—incident to grant of right of way, 579.
- Damages included, elevation of track—increased noise, smoke and cinders, 578.
- Damages included—excavation—disappearance of spring, 579.
- Damages included, general rule, 577.
- Damages included—grant of land for right of way—smoke, cinders and vibration—injury to other portion of lot, 578.
- Damages included—grant of right of way—contingent damages, 580.
- Damages included—grant of right of way—injuries from lawful construction and operation, 578.
- Damages included, grant of right of way—injuries from nonnegligent construction and operation, 579.
- Damages included—horse railway—contemplated use, 578.
- Damages included—illustrations, 578.
- Damages included—injury to private ferry, 580.
- Damages included—proper construction, 579.
- Damages included—switches and turntables—smoke—necessary incidents, 578.
- Damages included—watercourse—unnecessary diversion—trespass, 579.
- Damages not included—assessment—negligence—presumption, 581.
- Damages not included—award or release—negligent construction, 582.
- Damages not included—construction of waterway—unnecessary injuries, 581.
- Damages not included—deed to right of way—damages—scope of exemption clause—negligence in construction, 581.

NUISANCES, ETC.—Continued.

Damages not included—diversion of surface water—incident to grant, 582.

Damages not included, general rule, 580.

Damages not included—illustrations, 581.

Damages not included—surface water—negligence and trespass, 582.

Damages not included—unlawful use of right of way, 581.

Damages not included—unnecessary injuries—statutory compensation, 581.

Damages not included—unskillful construction, 582.

OBSTRUCTIONS.

See NUISANCES.

ODORS.

See NUISANCES.

OFFENSIVE ODORS.

See NUISANCES.

OVERFLOWS.

See NUISANCES.

OVERHEAD BRIDGES.

See NUISANCES.

OWNERSHIP OF FEE.

See NUISANCES.

PASSING TRAINS.

See NUISANCES.

PERCOLATION.

See NUISANCES.

PHYSICAL INVASION.

See NUISANCES.

PIERS.

See NUISANCES.

POLES.

See NUISANCES.

POLLUTION OF AIR.

See NUISANCES.

POSTS.

See NUISANCES.

PRESUMPTIONS.

See NUISANCES.

PRIVATE CORPORATIONS.

See NUISANCES.

PRIVATE INJURIES.

See NUISANCES.

PRIVATE NUISANCES.

See NUISANCES.

PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION.

See NUISANCES.

PRIVATE WRONGS.

See NUISANCES.

PROPERTY "INJURED."

See NUISANCES.

PROPERTY OWNERS.

See NUISANCES.

PUBLIC AGENTS.

See NUISANCES.

PUBLIC GOOD.

See NUISANCES.

PUBLIC INTERESTS PARAMOUNT.

See NUISANCES.

PUBLIC NUISANCES.

See NUISANCES.

PUBLIC WORK FOR PRIVATE PROFIT.

See NUISANCES.

PUBLIC WORKS.

See NUISANCES.

PUMPING STATION.

See NUISANCES.

RAILROAD HYDRANTS.

See NUISANCES.

RAILROAD SHOPS.

See NUISANCES.

RAILROADS.

See NUISANCES.

RAILROADS IN STREETS.

See NUISANCES.

RELIGIOUS WORSHIP.

See NUISANCES.

RELOCATION.

See NUISANCES.

RENTAL VALUE.

See NUISANCES.

RESTORATION OF HIGHWAYS.

See NUISANCES.

RIPARIAN PROPRIETORS.

See NUISANCES.

ROUND HOUSES.

See NUISANCES.

SEEPAGE.

See NUISANCES.

SEWERS.

See NUISANCES.

SIDEWALKS.

See NUISANCES.

SKILL.

See NUISANCES.

SLAUGHTER HOUSES.

See NUISANCES.

SMELTING WORK.

See NUISANCES.

SMOKE.

See NUISANCES.

SOVEREIGN'S IMMUNITY.

See NUISANCES.

SPARKS.

See NUISANCES.

SPECIAL DAMAGES.

See NUISANCES.

SPEED.

See NUISANCES.

SPRINGS.

See NUISANCES.

STABLES.

See NUISANCES.

STAGNANT WATER.

See NUISANCES.

STANDING TRAINS.

See NUISANCES.

STATUTES.

See NUISANCES.

STEAM ENGINES.

See NUISANCES.

STEAM WHISTLES.

See NUISANCES.

STOCK YARDS.

See NUISANCES.

STREET RAILWAYS.

See NUISANCES.

STREETS.

See NUISANCES.

SURFACE WATER.

See NUISANCES.

SWITCHING.

See NUISANCES.

TAKING.

See NUISANCES.

TEAMS.

See NUISANCES.

TELEPHONE WIRES.

See NUISANCES.

TEMPORARY OBSTRUCTIONS.

See NUISANCES.

TERMINALS.

See NUISANCES.

TERMINAL YARDS.

See NUISANCES.

TRAINS.

See NUISANCES.

TRESPASS.

See NUISANCES.

TURNABLES.

See NUISANCES.

UNAUTHORIZED OCCUPATION OF STREET BY RAILROAD.

See NUISANCES.

UNLOADING CARS.

See NUISANCES.

UNREASONABLE USE.

See NUISANCES.

VAPORS.

See NUISANCES.

VESSELS.

See NUISANCES.

VIADUCTS.

See NUISANCES.

VIBRATION.

See NUISANCES.

WATER AND WATERCOURSES.

See NUISANCES.

WATERWORKS.

See NUISANCES.

WHISTLES.

See NUISANCES.

WIRES.

See NUISANCES.

WORKS OF INTERNAL IMPROVEMENTS.

See NUISANCES.

YARDS.

See NUISANCES.

GENERAL INDEX.

ABANDONMENT.

See STATIONS AND DEPOTS.

ABOLITION OF GRADE CROSSINGS.

See RAILROADS IN STREETS.

ABSENCE OF NEGLIGENCE.

See INJURIES TO PROPERTY.

ABUTTERS.

See RAILROADS IN STREETS; STREET RAILWAYS; STREETS AND HIGHWAYS.

Abutter has no more rights in sidewalk than in roadway of street.

Hester v. Durham Traction Co. (N. Car.), 830.

Rights in streets and sidewalks. *Hester v. Durham Traction Co.* (N. Car.), 830.

ACCESS.

See RAILROADS IN STREETS.

ACCIDENTS ON TRACK.

See CHILDREN; CROSSINGS; LICENSEES; MASTER AND SERVANT; STOCK, INJURIES TO; STREET RAILWAYS; TRESPASSERS.

Collision between street car and fire engine, application of company's rule requiring cars to slow up while passing engine houses. *McKernan v. Detroit Citizens' St. Ry. Co.* (Mich.), 400.

Contributory Negligence.

Care required of person walking on railroad track. *Savage v. Southern Ry. Co.* (Va.), 151.

Findings as to contributory negligence of wife while in vehicle driven by husband were insufficient to overthrow general verdict in favor of plaintiff. *Indianapolis St. Ry. Co. v. Johnson* (Ind.), 445.

Instruction was not erroneous as invading province of jury, and misleading them to believe that in considering wife's contributory negligence they were not to consider negligence of her husband, who was driving the vehicle in which she was riding. *Indianapolis St. Ry. Co. v. Johnson* (Ind.), 445.

Right of driver of vehicle to assume that street car would not continue to run at excessive speed while he was crossing tracks. *Vrooman v. North Jersey St. Ry. Co.* (N. J.), 393.

Sufficiency of evidence on part of person struck by locomotive while walking on track. *Savage v. Southern Ry. Co.* (Va.), 151.

Wife's negligence while riding in vehicle driven by husband was question for jury. *Indianapolis St. Ry. Co. v. Johnson* (Ind.), 445.

Duty to stop train when person is seen walking on track. *Savage v. Southern Ry. Co.* (Va.), 151.

Evidence.

Collision between street car and fire engine, violation of company's rule requiring cars to slow up while passing engine houses was not negligence per se, but was evidence bearing on question of negligence. *McKernan v. Detroit Citizens' St. Ry. Co.* (Mich.), 400.

ACCIDENT ON TRACK—Continued.

- Conversation between contractor and train dispatcher as to duty to slow down trains approaching bridge where former was working was inadmissible, in absence of evidence of authority of latter to bind defendant in the premises. *Carpenter v. Chicago, R. I. & P. Ry. Co. (Iowa)*, 466.
- Imputed negligence, wife was not responsible for negligence of husband in failing to look for cars while driving vehicle in which she was riding. *Indianapolis St. Ry. Co. v. Johnson (Ind.)*, 445.
- Insufficiency of evidence to show duty to slow down train approaching bridge where contractor was working. *Carpenter v. Chicago, R. I. & P. Ry. Co. (Iowa)*, 466.
- Insufficiency of evidence to show negligence in failing to give signals when train was approaching bridge where contractor was working, where latter saw train in time, and nearly as soon as engineer could have discovered him. *Carpenter v. Chicago, R. I. & P. Ry. Co. (Iowa)*, 466.
- Negligence, insufficiency of evidence where train collided with person in street. *Louisville & N. R. Co. v. Lewis (Ala.)*, 440.
- Negligence of driver of fire engine not imputable to its engineer, who was riding on rear end when it collided with street car. *McKernan v. Detroit Citizens' St. Ry. Co. (Mich.)*, 400.
- Presumption of negligence not created by proof that person on track in street was struck by train. *Louisville & N. R. Co. v. Lewis (Ala.)*, 440.
- Right of trainmen to assume that person in street will leave track in time. *Louisville & N. R. Co. v. Lewis (Ala.)*, 440.
- Right to recover for injury to person on track in street depends on whether negligence was proximate cause. *Louisville & N. R. Co. v. Lewis (Ala.)*, 440.

ACQUITTAL.

See CARRIERS OF PASSENGERS.

ACTIONS IN STATE COURT.

See RECEIVERS.

ADDITIONAL SERVITUDE.

See STREET RAILWAYS.

ADJOINING PROPERTY.

See INJURIES TO PROPERTY.

ADMISSIONS.

See CARRIERS OF GOODS.

AGENTS.

See BAGGAGE; CARRIERS OF GOODS; CARRIERS OF PASSENGERS; CONNECTING CARRIERS; RECEIVERS.

AGREEMENT TO RESHIP.

See CARRIERS OF GOODS.

ALIGHTING PASSENGERS.

See CARRIERS OF PASSENGERS.

AMENDMENTS.

See FIRES SET BY LOCOMOTIVES.

ANIMALS.

See FRIGHTENING TEAMS; STOCK, INJURIES TO.

ANNOYANCE.

See INJURIES TO PROPERTY.

ANTICIPATING NEGLIGENCE.

See CROSSINGS; NEGLIGENCE.

APPLIANCES.

See CARRIERS OF PASSENGERS; FIRES SET BY LOCOMOTIVES; MASTER AND SERVANT.

APPLICATION FOR EMPLOYMENT.

See MASTER AND SERVANT.

APPREHENSION OF DANGER.

See CARRIERS OF PASSENGERS; CONTRIBUTORY NEGLIGENCE.

ARGUMENT OF COUNSEL.

See MASTER AND SERVANT.

ASSAULTS.

See CARRIERS OF PASSENGERS; TRESPASSERS.

ASSIGNEES.

See BILLS OF LADING.

ASSISTING PASSENGERS.

See CARRIERS OF PASSENGERS.

ASSUMPTION OF RISK.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT.

ASSUMPTION THAT TRAVELER WILL AVOID DANGER.

See ACCIDENTS ON TRACK.

AUTOMATIC COUPLERS.

See EMPLOYERS' LIABILITY ACTS.

AUTOMATIC LIGHTS.

See CROSSINGS.

BAGGAGE.

Business papers of agent carried in his trunk, were not baggage; and in absence of consent or custom, carrier was not liable for their loss. *Yazoo & M. V. R. Co. v. Georgia Home Ins. Co.* (Miss.), 766.

Damages.

Delay, loss of profits by traveling salesman, caused by want of samples, too remote and speculative. *Seaboard Air Line Ry. v. Harris* (Ga.), 285.

BAGGAGE CARS.

See CARRIERS OF PASSENGERS.

BANKS.

See BILLS OF LADING.

BEGINNING OF RELATION.

See CARRIERS OF PASSENGERS.

BILLS OF LADING.

See CONNECTING CARRIERS.

Assignee's title to freight. *Nat. Bank of Bristol v. Baltimore & O. R. Co.* (Md.), 206.

Assignee's title to freight not affected by his assignor's failure to

BILLS OF LADING—Continued.

pay for freight, which he had bought on credit. *Nat. Bank of Bristol v. Baltimore & O. R. Co. (Md.)*, 206.

Bill of lading issued in Virginia governed as to legal qualities by law of that state. *Nat. Bank of Bristol v. Baltimore & O. R. Co. (Md.)*, 206.

Discounting draft, rights of bank. *Nat. Bank of Bristol v. Baltimore & O. R. Co. (Md.)*, 206.

Endorsement and delivery of bill transfers title to property to vendee, and divests vendor's lien, subject only to his right to stoppage in transitu. *Nat. Bank of Bristol v. Baltimore & O. R. Co. (Md.)*, 206.

May be transferred. *Nat. Bank of Bristol v. Baltimore & O. R. Co. (Md.)*, 206.

Negotiability, common-law doctrine. *Nat. Bank of Bristol v. Baltimore & O. R. Co. (Md.)*, 206.

Negotiability destroyed by stamping or printing "not negotiable" across face. *Nat. Bank of Bristol v. Baltimore & O. R. Co. (Md.)*, 206.

One who in good faith takes bill of lading from vendee acquires title to goods, notwithstanding fraud of vendee, even as against defrauded vendor. *Nat. Bank of Bristol v. Baltimore & O. R. Co. (Md.)*, 206.

Stoppage in transitu, vendor deprived of right by assignment of bill of lading by vendee. *Nat. Bank of Bristol v. Baltimore & O. R. Co. (Md.)*, 206.

Vendee's right to procure bill in his own name; and rights of his assignee, not affected by vendor's failure to pay price of goods. *Nat. Bank of Bristol v. Baltimore & O. R. Co. (Md.)*, 206.

BLIND PERSONS.

See CARRIERS OF PASSENGERS.

BLOCKING RAILS.

See MASTER AND SERVANT.

BOARDING MOVING CARS.

See CARRIERS OF PASSENGERS.

BOARDING PASSENGERS.

See CARRIERS OF PASSENGERS.

BREACH OF CONTRACT.

See DAMAGES.

BRUTAL CONDUCT.

See MASTER AND SERVANT.

BUILDINGS NEAR TRACKS.

See FIRES SET BY LOCOMOTIVES.

BURDEN OF PROOF.

See CARRIERS OF GOODS; CARRIERS OF PASSENGERS; CONNECTING CARRIERS.

BUSINESS PROPERTY.

See RAILROADS IN STREETS.

CABOOSE.

See LICENSEES.

CAPRICE.

See CARRIERS OF PASSENGERS.

CARRIAGE BY WATER.

See CONNECTING CARRIERS.

CARRIERS.

See BAGGAGE; BILLS OF LADING; CONNECTING CARRIERS; INTERSTATE COMMERCE; RAILROAD COMMISSIONS.

CARRIERS OF FREIGHT.

See STREET RAILWAYS.

CARRIERS OF GOODS.

Admissions of consignor not binding on consignee, in action by latter against carrier for nondelivery. *Bank of Irwin v. American Express Co. (Iowa)*, 245.

Consignee's ownership of freight, presumption of sufficient to sustain action by him, either in tort or contract. *Bank of Irwin v. American Express Co. (Iowa)*, 245.

Damages.

Carrier liable on account of misrepresentations of its agent as to freight rates, where shipper contracted for sale of coal at certain price, relying on such misrepresentations, though agent named a rate less than that posted in accordance with the interstate commerce law. *Texas & P. Ry. Co. v. Mugg & Dryden (Tex.)*, 763.

Exemplary damages for willful violation of rule of railroad commission made to prevent discrimination in furnishing facilities. *Augusta Brokerage Co. v. Central of Georgia Ry. Co. (Ga.)*, 4.

Delay.

In action, under N. Car. Acts 1903, p. 999, c. 390, to recover penalty for a delay of more than four days in the transportation of goods, the burden of showing where the delay occurred is on plaintiff. *Walker Bros. v. Southern Ry. Co. (N. Car.)*, 690.

N. Car. Acts 1903, p. 999, c. 590, imposing penalty upon carrier, refers to a delay in beginning the transportation or starting the goods from the station of their receipt, and does not require a delivery at their destination within the specified time. *Walker Bros. v. Southern Ry. Co. (N. Car.)*, 690.

Delivery.

Placing car on team track not such delivery as to deprive carrier of lien for demurrage charges. *Southern Ry. Co. v. Lockwood Mfg. Co. (Ala.)*, 306.

Demurrage.

Right to lien not destroyed by placing car on team track to be unloaded by consignee. *Southern Ry. Co. v. Lockwood Mfg. Co. (Ala.)*, 306.

Discrimination.

Power of state railroad commission to promulgate rule to prevent discrimination in furnishing facilities. *Augusta Brokerage Co. v. Central of Georgia Ry. Co. (Ga.)*, 4.

Railroad carrying raw material to factories cannot under N. Car. Laws 1899, p. 301, c. 164, § 13, charge a factory which agrees to ship the manufactured product by the same road less for the service than it charges a factory which will make no such agreement. *Hilton Lumber Co. v. Atlantic Coast Line R. Co. (N. Car.)*, 729.

Willful violation of rule made by railroad commission, sufficiency of petition. *Augusta Brokerage Co. v. Central of Georgia Ry. Co. (Ga.)*, 4.

Evidence.

Evidence of good moral character of express company's em-

CARRIERS OF PASSENGERS—Continued.

- Question for jury where passenger jumped from moving street car to avoid danger. *Mannon v. Camden Interstate Ry. Co.* (W. Va.), 312.
- Riding on platform of crowded steam railroad car, question for jury. *Chicago & W. I. R. Co. v. Newell* (Ill.), 706.
- Standing on platform, from necessity, to get fresh air, was not, as matter of law, under Mich. Comp. Laws, § 6303. *Morgan v. Lake Shore & M. S. Ry. Co.* (Mich.), 675.
- Standing on platform of moving electric car, without necessity, is negligence per se. *Kirchner v. Oil City St. Ry. Co.* (Pa.), 711.
- Standing on running board of street car. *Ft. Wayne Traction Co. v. Hardendorf* (Ind.), 738.
- Standing on running board of street car in violation of carrier's rule, instruction erroneous for omitting to inform jury that it was necessary to show that passenger knew of the existence of the rule. *Ft. Wayne Traction Co. v. Hardendorf* (Ind.), 738.
- Standing on running board of street car, question for jury where passenger was struck by trolley pole while attempting to enter car when it had almost stopped, and speed was accelerated while he was making attempt. *Wheeler v. South Orange & M. Traction Co.* (N. J.), 52.
- Contributory negligence and negligence after discovery of plaintiff's peril, proper instruction as to effect of, in action for injury to passenger from fall from rear platform of street car. *South Covington & C. St. Ry. Co. v. Riegler's Adm'r* (Ky.), 256.

Damages.

- Compensatory damages recoverable where failure to stop train at flag station to receive passengers was due to negligence in failing to see signal to stop. *Southern Ry. Co. v. Lanning* (Miss.), 1.
- Delay. *Miller v. Southern Ry. Co.* (S. Car.), 33.
- Delay, measure of damages where carrier not notified in regard to purpose of journey. *Illinois Cent. R. Co. v. Head* (Ky.), 283.
- Delay, mere inconvenience, loss of time, and fatigue not elements. *Miller v. Southern Ry. Co.* (S. Car.), 33.
- Delay, passenger must show pecuniary or personal injury. *Miller v. Southern Ry. Co.* (S. Car.), 33.
- Delay, punitive damages not recoverable unless carrier's conduct was willful, malicious and wanton. *Miller v. Southern Ry. Co.* (S. Car.), 33.
- Instruction was not a "roving commission to jury to establish their own standard of damages," but related only to ill health and mental and physical suffering in consequence of passenger's miscarriage. *West v. St. Louis Southwestern Ry. Co.* (Mo.), 855.
- Punitive and compensatory damages for refusal to sell ticket to blind person, whom ticket agent knows to be capable of traveling alone without requiring extra care or attention. *Illinois Cent. R. Co. v. Smith* (Miss.), 293.
- Punitive damages for delay in starting train, where conductor refused to give information. *Miller v. Southern Ry. Co.* (S. Car.), 33.
- Punitive damages, for ejecting passenger wrongfully and with unnecessary violence, could not be recovered against carrier, where it did not participate in the wrongful acts, either by authorizing or approving them. *Peterson v. Middlesex and Somerset Traction Co.* (N. J.), 672.
- Punitive damages for failure to stop at flag station, in obedience to signal, to take on passenger, when, and when not, recoverable. *Southern Ry. Co. v. Lanning* (Miss.), 1.
- Punitive damages for wanton and willful ejection. *Dagnall v. Southern Ry. Co.* (S. Car.), 59.

CARRIERS OF PASSENGERS—Continued.

- Punitive damages for willful failure to stop at flag station to receive passenger, instruction not warranted by evidence. *Southern Ry. Co. v. Lanning* (Miss.), 1.
- Punitive damages for willful failure to stop to receive passenger at flag station, erroneous instructions. *Southern Ry. Co. v. Lanning* (Miss.), 1.
- Verdict for personal injuries was not excessive. *Redmon v. Metropolitan St. Ry. Co.* (Mo.), 248.
- Young woman put off at wrong station, where there was no place to pass the night, and compelled to walk all night in the country with young man, to destination, \$500 not excessive verdict. *Louisville, H. & St. L. Ry. Co. v. Covetts* (Ky.), 63.
- Degree of care due passengers riding in dangerous place. *Augusta Ry. & Electric Co. v. Smith* (Ga.), 16.
- Degree of care required of street railway. *Redmon v. Metropolitan St. Ry. Co.* (Mo.), 248.
- Degree of care required of street railway in keeping appliances in repair. *Mannon v. Camden Interstate Ry. Co.* (W. Va.), 312.
- Delay, sufficiency of evidence to prevent nonsuit where train returned to station after starting. *Miller v. Southern Ry. Co.* (S. Car.), 33.
- Duty of ticket agent to listen to explanations of blind man applying for ticket, and claiming that he is accustomed to travel alone without requiring extra care and attention. *Illinois Cent. R. Co. v. Smith* (Miss.), 293.
- Duty to carry persons suffering from mental or physical disability. *Illinois Cent. R. Co. v. Smith* (Miss.), 293.
- Duty to person suffering from mental or physical disability when ticket agent knows that he can travel alone without requiring extra care or attention. *Illinois Cent. R. Co. v. Smith* (Miss.), 293.

Ejection.

- Evidence of passenger's knowledge of printed conditions on ticket and proper construction of contract of carriage was properly excluded. *Dagnall v. Southern Ry. Co.* (S. Car.), 59.
- Right to recover as affected by fact that mistake in punching ticket made it appear to be expired. *Jevons v. Union Pac. R. Co.* (Kan.), 679.
- Emergency, existence of to be considered in determining whether motorman used reasonable care. *Tozier v. Haverhill & A. St. Ry. Co.* (Mass.), 238.
- Emergency instructions as to care due from motorman properly refused as misleading. *Tozier v. Haverhill & A. St. Ry. Co.* (Mass.), 238.

Evidence.

- Declarations of agent, statements of conductor to injured passenger as to cause of accident were not *res gestæ*. *Redmon v. Metropolitan St. Ry. Co.* (Mo.), 248.
- In action against street car company for ejecting passenger, where plaintiff's evidence tended to show that ejection was wanton and malicious, but that defendant approved of acts of conductor by retaining him in its service, it was error to exclude evidence of conductor's acquittal in prosecution for assault on the passenger. *Peterson v. Middlesex and Somerset Traction Co.* (N. J.), 672.
- In action for injuries to passenger thrown from platform of car, it was not error to admit evidence of crowded condition of train at a point several blocks distant, it appearing that train had not stopped between that place and the place of the accident. *Chicago & W. I. R. Co. v. Newell* (Ill.), 706.
- In action for injuries to passenger thrown from platform of crowded car, when train was running at the rate of 25 or 30 miles an hour, it was not error to exclude ordinance permitting

CARRIERS OF PASSENGERS—Continued.

- trains to run 35 miles an hour at the place of the accident. *Chicago & W. I. R. Co. v. Newell* (Ill.), 706.
- In an action for injuries received by a passenger on an elevated railroad train while passing between cars, evidence was insufficient to show any negligence on part of carrier. *Welch v. Boston Elevated Ry. Co.* (Mass.), 725.
- In an action for injury to passenger resulting from car on which he was riding coming in contact with vehicle which it was passing, evidence as to right of way of street cars over other vehicles was properly excluded. *Chicago City Ry. Co. v. Lannon* (Ill.), 735.
- Jury should have been instructed that evidence as to statements of conductor, which he, on cross examination, had denied having made, could only be considered on the question of his credibility. *South Covington & C. St. Ry. Co. v. Riegler's Adm'r* (Ky.), 256.
- Res gestæ*, remark of conductor, in reference to passenger who has been thrown from car, "Let him lay there, and go to hell" was admissible. *South Covington & C. St. Ry. Co. v. Riegler's Adm'r* (Ky.), 256.
- Res gestæ*, statements of conductor as to cause of accident to injured passenger were not. *Redmon v. Metropolitan St. Ry. Co.* (Mo.), 248.
- Statements of conductor to injured passenger as to cause of accident, admission of was prejudicial error. *Redmon v. Metropolitan St. Ry. Co.* (Mo.), 248.
- Where passenger was thrown from platform of crowded car, when train rounded curve at the rate of 25 or 30 miles an hour, in an action for his injuries, expert testimony as to whether such speed at that point was safe was inadmissible. *Chicago & W. I. R. Co. v. Newell* (Ill.), 706.
- Evidence showed that passenger was killed in the accident in question. *Denver & R. G. R. Co. v. Gunning* (Colo.), 842.
- In action for injury to excursion passenger caused by motion of car while he was standing at its door, where he had gone on account of the heat and crowded condition of the car, issues were presented for the jury by the petition, which alleged negligence in the use of a combination car, half of which was a baggage car without seats, and failure to protect passengers from the danger of falling between cars. *Harold v. Baltimore & O. R. Co.* (C. C. A.), 303.
- Issues, erroneous instruction in action based on negligence in suddenly starting car while passenger was alighting. *Chicago Union Traction Co. v. Hanthorn* (Ill.), 19.
- Issues, it was not error to refuse to instruct that the negligence alleged was that the company suddenly started the car while the passenger was in the act of alighting, after the car had stopped. *Chicago Union Traction Co. v. Olsen* (Ill.), 49.
- Liability for failure to stop at flag station, in obedience to signal, to take on passenger. *Southern Ry. Co. v. Lanning* (Miss.), 1.
- Limiting Liability.**
- Time limit, validity where passenger has paid full fare and his attention had not been called to printed conditions on ticket. *Dagnall v. Southern Ry. Co.* (S. Car.), 59.
- Mere fact that passenger on front platform of street car was caused to "swing to the side a little bit," or to "fall a little to the side" was not sufficient to show negligence in starting car or in increasing speed. *Faul v. North Jersey St. Ry. Co.* (N. J.), 694.
- Negligence and contributory negligence, instructions as to in action for injury to passenger from fall from rear platform of street car. *South Covington & St. Ry. Co. v. Riegler's Adm'r* (Ky.), 256.
- Negligence, failure to run train on schedule time. *Miller v. Southern Ry. Co.* (S. Car.), 33.

CARRIERS OF PASSENGERS—Continued.

- Negligence, failure to stop street car for passenger to alight, sufficiency of evidence. *Dallas Rapid Transit Co. v. Payne* (Tex.), 25.
- Negligence, finding warranted by evidence of frequency of breaking of trolley wire at certain point. *Mannon v. Camden Interstate Ry. Co.* (W. Va.), 312.
- Negligence in running train at rate of 25 or 30 miles an hour around curve so that passengers were thrown from platform of crowded car. *Chicago & W. I. R. Co. v. Newell* (Ill.), 706.
- Negligence, instruction as to what constituted, in action for injury caused from obstruction on rail. *Redmon v. Metropolitan St. Ry. Co.* (Mo.), 248.
- Negligence, question for jury where passenger on rear platform of street car, after being invited by conductor to enter car, was struck by trolley pole while walking on running board, in attempting to enter car, and speed was accelerated while he was making the attempt. *Wheeler v. South Orange & M. Traction Co.* (N. J.), 52.
- Negligence, where passenger, carried beyond station, was carried back to it on flat car, and directed to jump from it, there being no other means of alighting, though switchman assisted her to alight. *West v. St. Louis Southwestern Ry. Co.* (Mo.), 855.
- Prima facie case where street car passenger was injured by reason of sudden stop. *Redmon v. Metropolitan St. Ry. Co.* (Mo.), 248.
- Proximate cause, person signaling street car struck by reason of overlapping of car at curve, where subsequent increase of speed. *Garvey v. Rhode Island Co.* (R. I.), 30.
- Reasonableness of refusal to sell blind person a ticket a question for jury. *Illinois Cent. R. Co. v. Smith* (Miss.), 293.
- Right to refuse to carry blind persons. *Illinois Cent. R. Co. v. Smith* (Miss.), 293.
- Separation of white and colored passengers, sufficiency of indictment alleging violation of Kentucky statute. *Chesapeake & O. R. Co. v. Commonwealth* (Ky.), 288.
- Separation of white and colored passengers, unavoidable accident as a defense to prosecution for violation of Ky. statute. *Chesapeake & O. R. Co. v. Commonwealth* (Ky.), 288.
- Speed of train, sufficiency of allegation that it caused passenger, faint from foul air in crowded car, to fall from platform. *Morgan v. Lake Shore & M. S. Ry. Co.* (Mich.), 675.
- Subsequent injury resulting from fall, which was occasioned by fact that passenger had been subject to attacks of dizziness since she was injured in a collision, did not entitle her to recover. *Snow v. New York, N. H. & H. R. Co.* (Mass.), 47.
- Sufficiency of evidence to sustain verdict for plaintiff, in action from injury to passenger, struck by a passing car while on running board of street car. *Ft. Wayne Traction Co. v. Hardendorf* (Ind.), 738.
- There being nothing to notify carrier of the intention of person, who had assisted passenger to board train, to disembark at same station, it was not bound to hold train until he had time to alight, nor to notify him before train started. *Georgia, C. N. Ry. Co. v. Hutchins* (Ga.), 727.
- Where a passenger standing on running board of street car was struck by another car, question whether carrier was negligent in running cars so close together was for the jury. *Ft. Wayne Traction Co. v. Hardendorf* (Ind.), 738.

Who Are Passengers.

- Alighting from moving street car without paying fare. *Dallas Rapid Transit Co. v. Payne* (Tex.), 25.
- Construction of § 10,039, c. 47, Ann St. 1903. *Fremont, etc., R. Co. v. Hagblad* (Neb.), 226.
- Insufficiency of petition to show relation, under Nebraska statute. *Fremont, etc., R. Co. v. Hagblad* (Neb.), 226.

CARRIERS OF PASSENGERS—Continued.

- Passenger, after he alighted, was a mere licensee when he fell down stairway in depot building, to whom carrier did not owe the duty of keeping depot doors shut, but only that of keeping the way free from dangers. *Quantz v. Southern Ry. Co.* (N. Car.), 259.
- Person contracting for transportation on special train going to and from wreck had no right to action ex delicto against company for breach of contract to furnish him return transportation. *Du Bose v. Louisville & N. R. Co.* (Ga.), 727.
- Person signaling street car. *Garvey v. Rhode Island Co.* (R. I.), 30.
- Prospective passenger, person at station too soon is not. *Fremont, etc., R. Co. v. Hagblad* (Neb.), 226.
- Prospective passengers, sufficiency of allegation to show relation, under Nebraska statute. *Fremont, etc., R. Co. v. Hagblad* (Neb.), 226.
- Prospective passenger, when person at station becomes one. *Fremont, etc., R. Co. v. Hagblad* (Neb.), 226.
- Window falling on passenger, inference that it was not raised sufficiently not overcome. *Faulkner v. Boston & M. R. R.* (Mass.), 217.
- Window falling on passenger, insufficiency of evidence of negligence. *Faulkner v. Boston & M. R. R.* (Mass.), 217.

CARS OF DIFFERENT PATTERNS.

See MASTER AND SERVANT.

CARTMEN.

See CARRIERS OF GOODS.

CATTLE GUARDS.

See CARRIERS OF PASSENGERS; FENCES.

CHANGING LOCATION.

See RAILROADS.

CHARACTER OF CROSSINGS.

See CROSSINGS OF RAILROADS.

CHARACTER OF EMPLOYEES.

See CARRIERS OF GOODS.

CHILDREN.

See CARRIERS OF PASSENGERS.

Care due to avoid injuring children. *Rohloff v. Fair Haven & W. R. Co.* (Conn.), 154.

Contributory Negligence.

Care required of child, about eight years old for its own protection. *Rohloff v. Fair Haven & W. R. Co.* (Conn.), 154.

Child about eight years old may be guilty of. *Rohloff v. Fair Haven & W. R. Co.* (Conn.), 154.

Contributory negligence of child about eight years old in running in front of moving street car prevented recovery for its death, there being no proof that injury was wantonly inflicted. *Rohloff v. Fair Haven & W. R. Co.* (Conn.), 154.

Evidence.

Competency of circumstantial evidence to overcome engineer's testimony that he did not see child on track in time to avoid injuring it. *Gregory v. Wabash R. Co.* (Iowa), 457.

Whistle not sounded after engineer saw child two years old on track, evidence admissible to show. *Gregory v. Wabash R. Co.* (Iowa), 457.

CHOOSING DANGEROUS METHOD.

See MASTER AND SERVANT.

CIRCUMSTANTIAL EVIDENCE.

See FIRES SET BY LOCOMOTIVES.

CIVIL AUTHORITIES.

See CONNECTING CARRIERS.

CLAIMS.

See EVIDENCE.

CLEARANCE.

See CONNECTING CARRIERS.

CLEATS.

See MASTER AND SERVANT.

C. O. D.

See INTERSTATE COMMERCE.

COLLATERAL SECURITY.

See BILLS OF LADING.

COLORED PERSONS.

See CARRIERS OF PASSENGERS.

COMBINATION CARS.

See CARRIERS OF PASSENGERS.

COMBUSTIBLES.

See FIRES SET BY LOCOMOTIVES.

COMFORT.

See INJURIES TO PROPERTY.

COMMISSION FROM STATE.

See TRESPASSERS.

COMPENSATION.

See STREET RAILWAYS.

CONCURRING NEGLIGENCE.

See FELLOW SERVANTS; MASTER AND SERVANT.

CONDEMNATION PROCEEDINGS.

See EMINENT DOMAIN.

CONDUCTORS.

See CARRIERS OF PASSENGERS.

CONFLICTING THEORIES.

See NEGLIGENCE.

CONNECTING CARRIERS.

See RECEIVERS; TICKETS AND FARES.

Agreement to forward freight by designated vessel, whether general agent of railway receivers was acting for them or for steamship company, in making. *Northern Pac. Ry. Co. v. American Trading Co.* (U. S.), 744.

Burden of proving that goods were not lost by last carrier. *St. Louis Southwestern Ry. Co. v. Birdwell* (Ark.), 57.

Contract to forward freight by designated vessel of connecting carrier resulted from certain agreement. *Northern Pac. Ry. Co. v. American Trading Co.* (U. S.), 744.

CONNECTING CARRIERS—Continued.

Duties and liabilities as forwarders. *Fisher v. Boston & M. R. Co. (Me.)*, 297.

Duty to notify consignee of inability to deliver goods to next carrier. *Fisher v. Boston & M. R. Co. (Me.)*, 297.

Limiting Liability.

Special agreement of railway receivers to forward through shipment by steamer of connecting carrier was not modified by mere receipt and hypothecation of bill of lading containing certain printed conditions purporting to limit liability to own line, by clerk without knowledge of conditions and without special authority. *Northern Pac. Ry. Co. v. American Trading Co. (U. S.)*, 744.

Mistaken refusal to grant clearance while certain freight was on board because it was contraband of war did not constitute a "restraint of princes, rulers, or people," within the meaning of a clause of a bill of lading, so as to excuse nonperformance of agreement to forward shipment by the vessel. *Northern Pac. Ry. Co. v. American Trading Co. (U. S.)*, 744.

Recovery may be had against initial carrier for injury to perishable goods from delay in transportation, though each carrier was guilty of such delay; there being no evidence that the damages were caused solely by the delay of subsequent carriers. *St. Louis, I. M. & S. Ry. Co. v. Coolidge (Ark.)*, 713.

Refusal to grant clearance because freight was contraband of war was no excuse for nonperformance of special agreement of carrier to forward through shipment by steamer of connecting carrier sailing on designated day. *Northern Pac. Ry. Co. v. American Trading Co. (U. S.)*, 744.

Right of carrier as forwarder to select another route. *Fisher v. Boston & M. R. Co. (Me.)*, 297.

Termination of liability. *Fisher v. Boston & M. R. Co. (Me.)*, 297.

CONSEQUENTIAL DAMAGES.

See INJURIES TO PROPERTY.

CONSEQUENTIAL INJURIES.

See CARRIERS OF PASSENGERS.

CONSIDERATION.

See STATIONS AND DEPOTS.

CONSIGNEES.

See CARRIERS OF GOODS.

CONSIGNORS.

See CARRIERS OF GOODS.

CONSOLIDATION.

See EMINENT DOMAIN; RAILROADS.

CONSTITUTIONAL LAW.

See EMINENT DOMAIN; INTERSTATE COMMERCE.

CONSTRUCTION OF RAILROADS.

See INJURIES TO PROPERTY; STREET RAILWAYS.

CONSTRUCTION TRAINS.

See LICENSEES.

CONSTRUCTION WORK.

See RAILROADS IN STREETS.

CONTRABAND OF WAR.

See CONNECTING CARRIERS.

CONTRACTORS.

See ACCIDENTS ON TRACK; LICENSEES; LIENS.

CONTRACTS.

See CARRIERS OF LIVE STOCK; DAMAGES; RIGHT OF WAY; STREET RAILWAYS; SPURS AND SIDETRACKS; STATIONS AND DEPOTS; TICKETS AND FARES.

CONTRIBUTION AMONG WRONGDOERS.

See NEGLIGENCE.

CONTRIBUTORY NEGLIGENCE.

See CARRIERS OF PASSENGERS; CHILDREN; MASTER AND SERVANT; STATIONS AND DEPOTS; STREET RAILWAYS.

Error of judgment caused by apprehension of danger, circumstances to be considered in determining question. *Chretien v. New Orleans Rys. Co. (La.)*, 262.

Failure to exercise best judgment by one placed in position of danger through negligence of another. *Kansas City-Leavenworth R. Co. v. Langley (Kan.)*, 433.

Instruction as to properly refused as misleading, where subsequent negligence appeared to have been proximate cause of accident. *Birmingham Ry., Light & Power Co. v. Brantley (Ala.)*, 191.

Right of one placed in position of danger by negligence of another to rely on exercise of due care by latter to avoid injuring him. *Kansas City-Leavenworth R. Co. v. Langley (Kan.)*, 433.

Use of "shall" and "should" in instruction that, if jury shall find from preponderance of evidence that plaintiff acted as a person of ordinary prudence, they should find her free from contributory negligence, did not render instruction erroneous. *Indianapolis St. Ry. Co. v. Johnson (Ind.)*, 445.

CONTRIBUTORY NEGLIGENCE OF GUEST.

See ACCIDENTS ON TRACK.

CORPORATIONS.

Right of corporation to sue in own name. *New Orleans Terminal Co. v. Teller (La.)*, 65.

COSTS.

See CROSSINGS OF RAILROADS.

COUPLING CARS.

See MASTER AND SERVANT.

COUPON TICKETS.

See TICKETS AND FARES.

CREDIBILITY OF WITNESSES.

See CARRIERS OF GOODS; EVIDENCE; TRESPASSERS.

CRIMINAL LAW.

See CARRIERS OF PASSENGERS.

CROSS EXAMINATION.

See CARRIERS OF PASSENGERS.

CROSSING GATES.

See MASTER AND SERVANT.

CROSSINGS.

Care required of railroad and highway traveler, instruction as to not erroneous in adding that one is not bound to anticipate neg-

CROSSINGS—Continued.

ligence in another. *Atlanta & W. P. R. Co. v. Lovelace* (Ga.), 150.

Contributory Negligence.

Care required of traveler a question for jury. *Atlanta & W. P. R. Co. v. Lovelace* (Ga.), 150.

Sufficiency of evidence. *Ihrig v. Erie R. Co.* (Pa.), 159.

Evidence.

Invalid ordinance requiring safety gates inadmissible in evidence, even to show dangerous character of crossing. *Burns v. Pennsylvania R. Co.* (Pa.), 196.

Lights.

Maintenance of automatic lights was no defense to action for noncompliance with ordinance. *Chicago, etc., Ry. Co. v. Crawfordsville* (Ind.), 112.

Validity of ordinance requiring railroad companies to maintain lights at street crossings, except when there is moonlight or the city lights are in operation. *Chicago, etc., Ry. Co. v. Crawfordsville* (Ind.), 112.

Not bound to anticipate negligence in another. *Atlanta & W. P. R. Co. v. Lovelace* (Ga.), 150.

Power of courts, under West Virginia statute, to determine where crossings may be made, when companies unable to agree. *Wellsburg, etc., R. Co. v. Panhandle Traction Co.* (W. Va.), 631.

Stop, Look and Listen.

Care required of traveler, not erroneous to refuse to define in instruction. *Atlanta & W. P. R. Co. v. Lovelace* (Ga.), 150.

Conduct of ordinarily prudent man a question for jury. *Savage v. Southern Ry. Co.* (Va.), 151.

Pennsylvania rule. *Ihrig v. Erie R. Co.* (Pa.), 159.

Presumption of due care on part of deceased was not rebutted as matter of law. *Patterson v. Pittsburg, C. C. & St. L. Ry. Co.* (Pa.), 469.

Presumption of due care on part of deceased, when rebuttal a question for jury. *Patterson v. Pittsburg, C., C. & St. L. Ry. Co.* (Pa.), 469.

CROSSINGS OF RAILROADS.

See EMINENT DOMAIN.

Grade crossings not prohibited by West Virginia statute. *Wellsburg, etc., R. Co. v. Panhandle Traction Co.* (W. Va.), 631.

Location and character of crossing, circumstances to be considered by court, where companies unable to agree. *Wellsburg, etc., R. Co. v. Panhandle Traction Co.* (W. Va.), 631.

Right to obtain crossing for railroad. *Wellsburg, etc., R. Co. v. Panhandle Traction Co.* (W. Va.), 631.

Right to obtain under West Virginia statute, conditions and limitations. *Wellsburg, etc., R. Co. v. Panhandle Traction Co.* (W. Va.), 631.

When, in a suit under section 11 of chapter 52 of the Code of 1899 of West Virginia, the court decrees a crossing substantially different from the one demanded of defendant before the institution of the suit, a decree for costs against plaintiff is proper. *Wellsburg, etc., R. Co. v. Panhandle Traction Co.* (W. Va.), 632.

CULVERTS.

See WATER AND WATERCOURSES.

CUMULATIVE PENALTIES.

See LEASES AND RUNNING POWERS.

CURING ERROR.

See MASTER AND SERVANT.

CURVES.

See CARRIERS OF PASSENGERS.

CUSTOM AND USAGE.

See BAGGAGE; FENCES; FIRES SET BY LOCOMOTIVES;
MASTER AND SERVANT.

DAMAGES.

See BAGGAGE; CARRIERS OF GOODS; CARRIERS OF PASSENGERS; DEATH BY WRONGFUL ACT; INJURIES TO PROPERTY; PERSONAL INJURIES; RAILROADS IN STREETS; STATIONS AND DEPOTS; STREET RAILWAYS.

Agreement to give right to sell watches to railroad employees, and to collect price from their earnings, damages for loss of profits on watches which might have been sold, had railroad continued to act under agreement, could not be recovered. *Atchison, T. & S. F. Ry. Co. v. Thomas (Kan.)*, 647.

Breach of contract, damages recoverable. *Atchison, T. & S. F. Ry. Co. v. Thomas (Kan.)*, 647.

Breach of contract, speculative, remote, or contingent damages not recoverable. *Atchison, T. & S. F. Ry. Co. v. Thomas (Kan.)*, 647.

DEATH BY WRONGFUL ACT.

See CROSSINGS; EMPLOYERS' LIABILITY ACTS.

Damages.

Earning capacity of wife to be considered in action by husband. *Denver & R. G. R. Co. v. Gunning (Colo.)*, 842.

In action by husband for death of wife, only pecuniary loss can be recovered. *Denver & R. G. R. Co. v. Gunning (Colo.)*, 842.

In action for death of girl two years old, evidence that her father was a farmer and her mother a housekeeper, and that the wages of female teachers in the neighborhood was from \$30 to \$35 a month, was sufficient to go to the jury on the value of her life to her estate. *Gregory v. Wabash R. Co. (Iowa)*, 457.

Instruction that jury should apply their own observation, experience and knowledge to the facts and circumstances of the case was proper, in action by husband for death of wife. *Denver & R. G. R. Co. v. Gunning (Colo.)*, 842.

\$4,000 was not excessive verdict for death of wife, in action by husband. *Denver & R. G. R. Co. v. Gunning (Colo.)*, 842.

Interest in life of decedent, sufficiency of complaint. *Pennsylvania Co. v. Coyer (Ind.)*, 218.

DECLARATIONS.

See CARRIERS OF PASSENGERS; PERSONAL INJURIES.

DECLARED VALUE.

See CARRIERS OF LIVE STOCK.

DEDICATED STREETS.

See EMINENT DOMAIN.

DEEDS.

See RIGHT OF WAY; STATIONS AND DEPOTS.

DEFECTS.

See MASTER AND SERVANT.

DEFENSES.

See FRIGHTENING TEAMS; STATIONS AND DEPOTS.

DEFINITIONS.

See NEGLIGENCE.

DECREE OF CARE.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT; STREET RAILWAYS; TRESPASSERS.

DELAY.

See CARRIERS OF PASSENGERS.

DELIVERY.

See CARRIERS OF GOODS.

DEMURRAGE.

See CARRIERS OF GOODS.

DEPOTS.

See STATIONS AND DEPOTS.

DESIGNATING NEGLIGENT EMPLOYEE.

See MASTER AND SERVANT; NEGLIGENCE.

DIFFERENT DEPARTMENT LIMITATION.

See FELLOW SERVANTS.

DINING CARS.

See EMPLOYERS' LIABILITY ACTS.

DIRECTION OF VERDICT.

See NEGLIGENCE.

DISABILITY.

See CARRIERS OF PASSENGERS.

DISCHARGE OF RECEIVER.

See RECEIVERS.

DISCOUNTING.

See BILLS OF LADING.

DISCOVERED PERIL.

See TRESPASSERS.

DISCRIMINATION.

See CARRIERS OF GOODS.

DIVERSITY OF CITIZENSHIP.

See EMINENT DOMAIN.

DIZZINESS.

See CARRIERS OF PASSENGERS.

DRAFTS.

See BILLS OF LADING.

DRUMMERS.

See BAGGAGE.

DUE PROCESS OF LAW.

See EMINENT DOMAIN.

DUTY TO NOTIFY CONDUCTOR.

See CARRIERS OF PASSENGERS.

DUTY TO NOTIFY CONSIGNEE.

See CARRIERS OF GOODS; CONNECTING CARRIERS.

DUTY TO PROTECT PASSENGERS AGAINST STRANGERS.

See CARRIERS OF PASSENGERS.

EARNING CAPACITY.

See DEATH BY WRONGFUL ACT.

EJECTION.

See CARRIERS OF PASSENGERS; TRESPASSERS.

EJECTMENT.

See RIGHT OF WAY; STREET RAILWAYS.

ELECTRIC CURRENTS.

See CARRIERS OF PASSENGERS; STREET RAILWAYS.

ELECTRIC RAILWAYS.

See CARRIERS OF PASSENGERS.

ELECTRICAL EXPLOSIONS.

See CARRIERS OF PASSENGERS.

ELEMENTS OF DAMAGES.

See RAILROADS IN STREETS.

ELEVATED RAILWAYS.

See CARRIERS OF PASSENGERS.

EMBANKMENTS.

See RAILROADS IN STREETS.

EMERGENCIES.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT.

EMINENT DOMAIN.

See INJURIES TO PROPERTY; RAILROADS IN STREETS.

Acquisition of crossing by one railroad over another involves a taking of private property for public use. *Wellsburg, etc., R. Co. v. Panhandle Traction Co. (W. Va.)*, 631.

Damages.

Where whole dedicated street is condemned by a railroad, abutting owner is entitled to full value of the land taken. *Suffolk & C. Ry. Co. v. West End L. & I. Co. (N. Car.)*, 602.

Evidence.

Tax list inadmissible to show value of land. *Suffolk & C. Ry. Co. v. West End L. & I. Co. (N. Car.)*, 602.

Value of land, admissibility of evidence to show. *Suffolk & C. Ry. Co. v. West End L. & I. Co. (N. Car.)*, 602.

Exclusive privileges not conferred by statute authorizing railroad to condemn stock of another company. *New York, etc., R. Co. v. Offield (Conn.)*, 76.

N. Car. Priv. Laws 1901, p. 463, c. 168, empowering a majority of the stockholders of certain railways to consolidate with other companies and providing for assessing and paying the value of the dissenting stock, is an exercise of the power of eminent domain. *Spencer v. Seaboard Air Line Ry. Co. (N. Car.)*, 656.

Obligations of contract not impaired by statute authorizing railroad to condemn stock of another company. *New York, etc., R. Co. v. Offield (Conn.)*, 76.

One whose property is taken by condemnation proceedings is not deprived thereof without due process of law. *New York, etc., R. Co. v. Offield (Conn.)*, 76.

Original jurisdiction of federal circuit court of proceeding under

EMINENT DOMAIN—Continued.

- Ky. Stat., §§ 835-839, where diversity of citizenship. *Madisonville Trac. Co. v. Saint Bernard M. Co.* (U. S.), 99.
- Public interest, when railroad is justified in condemning balance of stock of another railroad company. *New York, etc., R. Co. v. Offield* (Conn.), 76.
- Public use, right of defendant to raise question. *New Orleans Terminal Co. v. Teller* (La.), 65.
- Right of telegraph companies to enter on railroad right of way, under federal statute conferring rights upon them with respect to military and post roads. *Western Union Tel. Co. v. Pennsylvania R. Co.* (U. S.), 479.
- Section 11 of chapter 52, Code of West Virginia, does not confer upon courts of equity jurisdiction to condemn property of a railroad, turnpike, or canal company for a crossing for another railroad, turnpike, or canal company. *Wellsburg, etc., R. Co. v. Panhandle Traction Co.* (W. Va.), 631.
- Stock in another railroad, constitutionality of statute allowing railroad company holding majority of stock to condemn balance where refusal to sell. *New York, etc., R. Co. v. Offield* (Conn.), 76.
- That condemnation by a railroad company of the few shares of stock of another railroad company which it does not already own may be for a private use is prevented by the former's charter, by the terms of which such acquisition will work a merger of the stock and franchises of the other company in those of its own. *New York, etc., R. Co. v. Offield* (Conn.), 76.
- Time of removal to federal court of proceeding under Ky. Stat., §§ 835-839. *Madisonville Trac. Co. v. Saint Bernard M. Co.* (U. S.), 99.

EMPLOYEES OF OTHER COMPANIES.

See LICENSEES.

EMPLOYERS' LIABILITY ACTS.

See FELLOW SERVANTS.

- Alabama statute providing action for injuries to employee resulting in death enforceable in Tennessee. *Whitlow v. Nashville, C. & St. L. R. Co.* (Tenn.), 357.
- Alabama statute, providing action for injuries to employees resulting in death, not a penal statute, so as to prevent courts of another state from entertaining actions based thereon. *Whitlow v. Nashville, C. & St. L. R. Co.* (Tenn.), 357.
- Application of Wisconsin statute making railroads liable for injuries to servants caused by negligence of other employees. *McKivergan v. Alexander & Edgar Lumber Co.* (Wis.), 372.
- Automatic coupler act applicable to dining car. *Johnson v. Southern Pacific Co.* (U. S.), 274.
- Automatic coupler act, statute not complied with by equipping locomotive and car with automatic couplers which do not fit each other. *Johnson v. Southern Pacific Co.* (U. S.), 274.
- Automatic couplers, compliance with statute. *Johnson v. Southern Pacific Co.* (U. S.), 274.
- Automatic couplers, locomotives, application of federal statute. *Johnson v. Southern Pacific Co.* (U. S.), 274.
- Federal statute should not be so constructed so as to defeat obvious object of Congress. *Johnson v. Southern Pacific Co.* (U. S.), 274.
- In an action for the death of an employee, under N. Car. Priv. Laws 1897, p. 83, c. 56, § 1, plaintiff was not barred of the right to have the question as to whether defendant had the "last clear chance" to avoid the injury submitted to the jury by a rule of the company, which deceased had signed, and which, in part, fell within a clause of such statute preventing an employee from waiving the benefits of the law. *Lassiter v. Raleigh & G. R. Co.* (N. Car.), 629.

EMPLOYERS' LIABILITY ACTS—Continued.

"Railroad work," fireman throwing out waste matter, and thereby injuring section man. *Swartz v. Great Northern Ry. Co.* (Minn.), 790.

EMPLOYMENT CONTRACT.

See MASTER AND SERVANT.

ENTRY ON LANDS.

See RIGHT OF WAY.

EQUITY JURISDICTION.

See EMINENT DOMAIN.

ERROR OF JUDGMENT CAUSED BY FEAR.

See CARRIERS OF PASSENGERS.

ESTOPPEL.

See CARRIERS OF LIVE STOCK; PERSONAL INJURIES.

EVIDENCE.

See CARRIERS OF GOODS; CARRIERS OF PASSENGERS; CHILDREN; FIRES SET BY LOCOMOTIVES; INJURIES TO PROPERTY; MASTER AND SERVANT; PERSONAL INJURIES; STATIONS AND DEPOTS; TICKETS AND FARES; TRESPASSERS.

Letters from claimant admissible as bearing on genuineness and extent of injuries. *Snow v. New York, N. H. & H. R. Co.* (Mass.), 47.

Speed of a train, admissibility of opinion evidence. *Gregory v. Wabash R. Co.* (Iowa), 457.

Witness, fact that he is an employee of one of the parties a proper matter for consideration of jury, in passing upon his credibility. *Central of Georgia Ry. Co. v. Bagley* (Ga.), 172.

EVIDENCE OF CHARACTER.

See CARRIERS OF GOODS.

EXCESSIVE VERDICT.

See CARRIERS OF PASSENGERS; DEATH BY WRONGFUL ACT; INJURIES TO PROPERTY; PERSONAL INJURIES.

EXCLUSIVE PRIVILEGES.

See EMINENT DOMAIN.

EXCURSION TRAINS.

See CARRIERS OF PASSENGERS.

EXCUSES.

See STATIONS AND DEPOTS.

EXEMPLARY DAMAGES.

See CARRIERS OF GOODS; INJURIES TO PROPERTY.

EXPERT TESTIMONY.

See CARRIERS OF PASSENGERS; FRIGHTENING TEAMS; INJURIES TO PROPERTY; MASTER AND SERVANT.

EXPIRATION OF TICKET.

See TICKETS AND FARES.

EXPLANATIONS.

See CARRIERS OF PASSENGERS.

EXPLOSIONS.

See CARRIERS OF PASSENGERS.

EXPRESS COMPANIES.

See CARRIERS.

FACILITIES.

See CARRIERS OF GOODS.

FAILURE TO EXERCISE BEST JUDGMENT.

See CONTRIBUTORY NEGLIGENCE.

FARES.

See TICKETS AND FARES.

FATIGUE.

See CARRIERS OF PASSENGERS.

FEAR.

See CARRIERS OF PASSENGERS.

FEDERAL JURISDICTION.

See EMINENT DOMAIN.

FEDERAL RECEIVERS.

See RECEIVERS.

FEDERAL STATUTES.

See EMINENT DOMAIN.

FEET.

See MASTER AND SERVANT.

FELLOW SERVANTS.

Conductor vice principal of fireman of his train. *Virginia & S. W. Ry. Co. v. Bailey* (Va.), 795.

Conductor vice principal of fireman thrown from his car by impact in coupling cars, partly through negligence of conductor in permitting engine to approach cars to which coupling was to be made at dangerous speed. *Virginia & S. W. Ry. Co. v. Bailey* (Va.), 795.

Different department limitation of fellow servant rule applied where employee engaged in attaching chain to logs to be dragged by engine was injured by act of engineer in starting engine without warning. *Conine v. Olympia Logging Co.* (Wash.), 387.

Employee injured while loading ashes on car was fellow servant of engineer, negligent in moving car. *Peterson v. New York, N. H. & H. R. Co.* (Conn.), 772.

Fireman fellow servant of brakeman of his train. *Virginia & S. W. Ry. Co. v. Bailey* (Va.), 795.

Fireman throwing out waste matter was fellow servant of section man injured thereby. *Swartz v. Great Northern Ry. Co.* (Minn.), 790.

Master, having furnished reasonably safe machinery and appliances, and instructed engineer to be careful, was not liable for the latter's negligence in moving car and thereby injuring fellow servant, who was loading it. *Peterson v. New York, N. H. & H. R. Co.* (Conn.), 772.

Master liable where injury to employee was caused by concurring negligence of fellow servant and vice principal. *Virginia & S. W. Ry. Co. v. Bailey* (Va.), 795.

Master not liable for negligence of fellow servant. *Peterson v. New York, N. H. & H. R. Co.* (Conn.), 772.

Roadmaster in charge wrecking train fellow servant of its con-

FELLOW SERVANTS—Continued.

- ductor, and could not recover for injury caused by collision between its sections, after it had been divided by agreement between them. *McDaniel v. Charleston & W. C. R. Co.* (S. Car.), 794.
- Roadmaster in control of wrecking train fellow servant of its conductor. *McDaniel v. Charleston & W. C. R. Co.* (S. Car.), 794.
- Wis. Rev. St. 1898, § 1816, making railroads liable for injuries to employees from negligence of fellow servants, does not apply to private logging railroads. *McKivergan v. Alexander & Edgar Lumber Co.* (Wis.), 372.

FENCES.

- Cattle guards, care required in providing, under Indiana statute. *Pennsylvania Co. v. Newby* (Ind.), 190.
- Cattle guards, usage of other companies immaterial where question is as to care required in providing. *Pennsylvania Co. v. Newby* (Ind.), 190.
- Stations grounds at flag station, not required to fence under Nebraska statute. *Chicago, B. & Q. R. Co. v. Sevcek* (Neb.), 185.
- Stations grounds, how far excused from fencing under Nebraska statute. *Chicago, B. & Q. R. Co. v. Sevcek* (Neb.), 185.

FIRE ENGINES.

See ACCIDENTS ON TRACK.

FIRES SET BY LOCOMOTIVES.

- Amendment to petition did not set up new cause of action. *Southern Ry. Co. v. Horine* (Ga.), 427.
- Combustibles on right of way, duty of company not affected by lease of portion of right of way to private person. *Sprague v. Atchison, T. & S. F. Ry. Co.* (Kan.), 471.
- Duty of engineer to shut off steam in passing inflammable barn, during a drought, and when he was chargeable with notice that larger sparks were being emitted than should have passed through a spark arrester. *Lake Erie & W. R. Co. v. McFall* (Ind.), 407.
- Evidence.
- Emission of sparks at other times, evidence of, in view of the issues, was inadmissible. *Sprague v. Atchison, T. & S. F. Ry. Co.* (Kan.), 471.
 - Spark arresters of certain kind, use of how shown. *Norwich Ins. Co. v. Oregon R. Co.* (Ore.), 141.
- Habitual carelessness of trainmen entitled jury to conclude that fire was result of negligence. *Norwich Ins. Co. v. Oregon R. Co.* (Ore.), 141.
- Interrogatories as to defect in construction of engine, insufficiency of answer. *Lake Erie & W. R. Co. v. McFall* (Ind.), 407.
- Negligence, allegations of complaint sufficiently broad to let in proof of character of care and caution exercised by trainmen in managing engine, and whether they were negligent. *Norwich Ins. Co. v. Oregon R. Co.* (Ore.), 141.
- Negligence, harmless error in instruction. *Lake Erie & W. R. Co. v. McFall* (Ind.), 408.
- Negligence in operating locomotives, sufficiency of petition. *Lake Erie & W. R. Co. v. McFall* (Ind.), 407.
- Negligence, instruction as to how established not erroneous as assuming that train was running at high rate of speed. *Norwich Ins. Co. v. Oregon R. Co.* (Ore.), 141.
- Negligence, insufficiency of evidence. *Toledo, etc., R. Co. v. Parks* (Ind.), 397.
- Negligence of railroad in maintaining a dilapidated shingle roof building in close proximity to tracks was a question for jury. *Knickel v. Chicago & N. W. Ry. Co.* (Wis.), 453.
- Negligence of railroad in maintaining a dilapidated shingle roof building near track, conduct of ordinarily prudent person the proper test. *Knickel v. Chicago & N. W. Ry. Co.* (Wis.), 453.

FIRES SET BY LOCOMOTIVES—Continued.

Negligence, sufficiency of petition. *Lake Erie & W. R. Co. v. Mc-Fall* (Ind.), 407.

Origin, sufficiency of circumstantial evidence. *Toledo, St. L. & W. R. Co. v. Parks* (Ind.), 397.

Right of action and liability of defendant, sufficiency of evidence. *Southern Ry. Co. v. Horine* (Ga.), 427.

Spark arresters, care required in furnishing. *Bottoms v. Seaboard Air Line Ry.* (N. Car.), 443.

Spark arresters, error in charging that "best approved" kind must be furnished was not rendered harmless by evidence. *Bottoms v. Seaboard Air Line Ry.* (N. Car.), 443.

Where court embodies in its questions for a special verdict the duty of jury to consider all circumstances, it is not error to refuse to insert after "locomotives" in question, the words "properly equipped with proper spark arresting machinery in good condition." *Knicker v. Chicago & N. W. Ry. Co.* (Wis.), 453.

FLAG STATIONS.

See **CARRIERS OF PASSENGERS; FENCES.**

FOOT GUARDS.

See **MASTER AND SERVANT.**

FOOT PATHS.

See **LICENSEES.**

FORECLOSURE.

See **RECEIVERS.**

FOREIGN CARS.

See **MASTER AND SERVANT.**

FORWARDERS.

See **CONNECTING CARRIERS.**

FORWARDING FREIGHT.

See **CONNECTING CARRIERS; RECEIVERS.**

FOUL AIR.

See **CARRIERS OF PASSENGERS.**

FREE TRANSPORTATION.

See **LICENSEES.**

FREIGHT.

See **BILLS OF LADING; CARRIERS OF GOODS; CONNECTING CARRIERS; STREET RAILWAYS.**

FRESH AIR.

See **CARRIERS OF PASSENGERS.**

FRIGHT.

See **CARRIERS OF PASSENGERS.**

FRIGHTENING TEAMS.

See **STREET RAILWAYS.**

Evidence.

Necessity of blowing whistle to notify employees to commence and quit work, expert testimony not admissible. *Powell v. Nevada, C. & O. Ry.* (Neb.), 168.

Teams frightened by same whistle on other occasion. *Powell v. Nevada, C. & O. Ry.* (Neb.), 168.

Team frightening by sounding of whistle in railroad's shops, statutory power to maintain necessary buildings no defense. *Powell v. Nevada, C. & O. Ry.* (Neb.), 168.

GATES.

See CROSSINGS; MASTER AND SERVANT.

GOVERNOR'S PROCLAMATION.

See CARRIERS OF PASSENGERS.

GRADE CROSSINGS.

See CROSSING OF RAILROADS; RAILROADS IN STREETS.

GROCERIES.

See RAILROADS IN STREETS.

GROSS NEGLIGENCE.

See NEGLIGENCE.

HABITUAL NEGLIGENCE.

See FIRES SET BY LOCOMOTIVES.

HAND HOLDS.

See MASTER AND SERVANT.

HEALTH.

See INJURIES TO PROPERTY.

HELPLESS PERSONS.

See CARRIERS OF PASSENGERS.

HISTORICAL FACTS.

See JUDICIAL NOTICE.

HORSES.

See FRIGHTENING TEAMS.

HUSBAND AND WIFE.

See ACCIDENTS ON TRACK; DEATH BY WRONGFUL ACT; PERSONAL INJURIES.

HYPOTHETICAL QUESTIONS.

See PERSONAL INJURIES.

IMMINENT DANGER.

See CONTRIBUTORY NEGLIGENCE.

IMPEACHING WITNESSES.

See CARRIERS OF PASSENGERS; TRESPASSERS.

IMPUTABLE NEGLIGENCE.

See ACCIDENTS ON TRACK.

INCONVENIENCE.

See CARRIERS OF PASSENGERS.

INCREASE OF TRAFFIC.

See INJURIES TO PROPERTY.

INDICTMENT.

See CARRIERS OF PASSENGERS.

INEXPERIENCE.

See MASTER AND SERVANT.

INFANCY.

See CHILDREN.

INFORMATION.

See CARRIERS OF PASSENGERS.

INGRESS AND EGRESS.

See STREET RAILWAYS.

INJUNCTIONS.

See RAILROADS; STREET RAILWAYS.

INJURIES TO BUSINESS.

See RAILROADS IN STREETS.

INJURIES TO PROPERTY.

See RAILROADS IN STREETS; STREET RAILWAYS; WATER AND WATERCOURSES.

Burden of proof, statute changing, in actions for killing stock and setting fires, not applicable in actions for injuries from construction and operation of railroad. *Baltimore Belt R. Co. v. Sattler* (Md.), 80.

Construction of tunnels and operation of train therein, property owners entitled to damages in absence of negligence, and in spite of legislative authority. *Baltimore Belt R. Co. v. Sattler* (Md.), 80.

Damages.

Damage recoverable for injury to property by construction of railroad whether they result from direct invasion or from consequential injuries. *Baltimore Belt R. Co. v. Sattler* (Md.), 80.

Malice and exemplary damages, question of not required to be withdrawn from jury, in action for trespass by railroad, merely because the acts constituting trespass were necessary for proper maintenance of railroad, where it appeared that the trespass was in disregard of written protest, and without offer to make compensation. *Louisville & N. R. Co. v. Smith* (Ala.), 597.

Owner of adjoining property could not recover on account of annoyance consisting of noise, smoke, etc., caused by the authorized operation of railroad, unless such annoyance was the result of negligence. *Fisher v. Seaboard Air Line Ry. Co.* (Va.), 683.

Permanent distinguished from recurrent, instruction eliminated causes of action for permanent injuries. *Louisville & N. Terminal Co. v. Lelleyett* (Tenn.), 498.

Property owner not barred from recovering damages from negligent construction and maintenance of railroad by reason of fact that railroad had been constructed before he purchased his property. *Richards v. Ohio River R. Co.* (W. Va.), 607.

Terminal facilities, excessive verdict for injuries from their operation near property. *Louisville & N. Terminal Co. v. Lelleyett* (Tenn.), 498.

Terminal facilities, measure of damages caused by careful operation near residence. *Louisville & N. Terminal Co. v. Lelleyett* (Tenn.), 498.

Terminal facilities, measure of damages caused by negligent operation near residence. *Louisville & N. Terminal Co. v. Lelleyett* (Tenn.), 498.

Terminal facilities, plaintiff could not recover damages incident to increase of traffic, caused by their location near his property, in front of which tracks had been previously operated, and could only recover for injuries caused by the terminal facilities, and tracks necessary to operate them. *Louisville & N. Terminal Co. v. Lelleyett* (Tenn.), 498.

Evidence.

Effect of smoke on other property. *Baltimore Belt R. Co. v. Sattler* (Md.), 80.

Expert testimony admissible to show noncompliance with ordi-

INJURIES TO PROPERTY—Continued.

- nance in constructing tunnel. *Baltimore Belt R. Co. v. Sattler* (Md.), 80.
- Expert testimony as to the exact amount and extent of damages from construction and operation of railroad tunnels is inadmissible. *Baltimore Belt R. Co. v. Sattler* (Md.), 80.
- Expert testimony inadmissible to show that diminution in value of land was caused by smoke and vibrations occasioned by operating trains in tunnel. *Baltimore Belt R. Co. v. Sattler* (Md.), 80.
- Expert testimony to show increased volume of smoke, in action for injuries from construction of tunnel and operation of trains therein. *Baltimore Belt R. Co. v. Sattler* (Md.), 80.
- In action for injuries to use of property from maintenance of terminal yard, declaration was not objectionable for misjoinder of causes of action for injury to health of plaintiff's wife and children. *Louisville & N. Terminal Co. v. Lellyett* (Tenn.), 498.
- In action for injury to adjoining property, complaint was demurrable, because defendant was entitled to pull down its property, and, if its acts were negligently done, acts of negligence were not alleged. *Fisher v. Seaboard Air Line Ry. Co.* (Va.), 683.
- Right of trustee to sue for damages to use of property, health, and comfort, caused by maintenance of terminal yard near by. *Louisville & N. Terminal Co. v. Lellyett* (Tenn.), 498.
- Terminal yard, charter, in which exact location was not prescribed, did not authorize it to be so located as to impair or destroy use of adjoining property. *Louisville & N. Terminal Co. v. Lellyett* (Tenn.), 498.
- Where plaintiff claimed damages for injuries to his tenement by reason of the negligence of railroad company in tearing down an adjoining tenement belonging to it to make room for its tracks, and for injuries from smoke, noise, etc., resulting from negligent operation of railroad, such causes of action were of the same nature, and could be joined in the same declaration. *Fisher v. Seaboard Air Line Ry. Co.* (Va.), 683.

INJURY TO REPUTATION.

See CARRIERS OF PASSENGERS.

INNOCENT PURCHASER.

See BILLS OF LADING.

INSTRUCTION TRIPS.

See MASTER AND SERVANT

INSTRUCTIONS.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CONTRIBUTORY NEGLIGENCE; DEATH BY WRONGFUL ACT; FIRES SET BY LOCOMOTIVES; MASTER AND SERVANT; NEGLIGENCE.

INTENT.

See NEGLIGENCE.

INTENTIONAL WRONG.

See TRESPASSERS.

INTERROGATORIES.

See FIRES SET BY LOCOMOTIVES.

INTERSTATE COMMERCE.

See CARRIERS OF GOODS.

Federal jurisdiction to review state decision upholding seizure, under state laws, of intoxicating liquors shipped C. O. D. into that

INTERTATE COMMERCE—Continued.

state from another state. *Am. Express Co., etc. v. State of Iowa* (U. S.), 268.

Intoxicating liquors shipped C. O. D. from one state into another not subject to seizure while in hands of express company. *Am. Express Co., etc. v. State of Iowa* (U. S.), 268.

INTERURBAN RAILWAYS.

See **STREET RAILWAYS.**

INTOXICATING LIQUORS.

See **INTERSTATE COMMERCE.**

ISSUES.

See **CARRIERS OF PASSENGERS.**

JOINDER OF CAUSES OF ACTION.

See **INJURIES TO PROPERTY.**

JOLTS AND JARS.

See **CARRIERS OF PASSENGERS.**

JUDICIAL NOTICE.

Historical facts. *Bosworth v. Union R. Co.* (R. I.), 9.

Mobs, existence of on certain date. *Bosworth v. Union R. Co.* (R. I.), 9.

JURISDICTION.

See **EMINENT DOMAIN; EMPLOYERS' LIABILITY ACTS; RECEIVERS.**

KNOWLEDGE OF DANGER.

See **MASTER AND SERVANT.**

LACHES.

See **RAILROADS.**

"LAST CLEAR CHANCE."

See **MASTER AND SERVANT; TRESPASSERS.**

LEASES AND RUNNING POWERS.

See **FIRES SET BY LOCOMOTIVES; TICKETS AND FARES.**

Penalties provided for on account of refusal of transfer, on payment of single fare, from one to another of leased surface railroads, under New York Laws 1892, pp. 1393, 1406, c. 676, §§ 78, 104, are not cumulative, and the bringing of an action for one penalty is a waiver of all previous penalties incurred. *Griffin v. Interurban St. Ry. Co.* (N. Y.), 718.

Railroad company liable to passengers injured on its railway by the negligence or wrong of another company operating it. *Chicago & W. I. R. Co. v. Newell* (Ill.), 706.

Section 104 Laws of New York 1890, p. 114, applies to surface street railway lines leased by one or more corporations to another, and operated by the lessee, so as to render the lessee liable, where transfers are tendered and refused, for the penalties provided for their refusal. *Griffin v. Interurban St. Ry. Co.* (N. Y.), 718.

LEGISLATIVE AUTHORITY.

See **INJURIES TO PROPERTY.**

LETTERS.

See **EVIDENCE.**

LEX LOCI.

See **BILLS OF LADING.**

LICENSEES.

See **STATIONS AND DEPOTS; TRESPASSERS.**

Care due from trainmen. *Sentell v. Southern Ry. (S. Car.)*, 161.

Care due person allowed to ride gratuitously in caboose of work train. *Pennsylvania Co. v. Coyer (Ind.)*, 218.

Duty of trainmen to lookout for. *Sentell v. Southern Ry. (S. Car.)*, 161.

Presumption of right to ride not created by fact that person is on train. *Pennsylvania Co. v. Coyer (Ind.)*, 218.

Riding in caboose of work train, burden of proving right to ride and that care was due from company. *Pennsylvania Co. v. Coyer (Ind.)*, 218.

Waiver of rule prohibiting employees of construction company from riding on work trains, what does, and does not constitute. *Pennsylvania Co. v. Coyer (Ind.)*, 218.

Who Are Licensees.

Passenger when he fell down a stairway in the depot building, after he had alighted from train, was a mere licensee, to whom the carrier did not owe the duty of keeping the depot doors closed, but only of keeping the way free from dangers. *Quantz v. Southern Ry. Co. (N. Car.)*, 259.

Person sitting on end of cross tie, with his feet in path, used for many years without objection, question for jury. *Sentell v. Southern Ry. (S. Car.)*, 161.

LIENS.

See **CARRIERS OF GOODS.**

One furnishing supplies to a railroad subcontractor has no lien therefor against the railroad. *St. Louis, I. M. & S. Ry. Co. v. Henry & McNeil (Ark.)*, 786.

One who furnishes material which is used in the construction of a railroad has a lien on the road for the price thereof, regardless of whether the material was sold to the railroad or to its contractors. *Ozark & C. Cent. Ry. Co. v. Moran B. & N. Mfg. Co. (Ark.)*, 784.

LIFE TABLES.

See **PERSONAL INJURIES.**

LIGHTS.

See **CROSSINGS.**

LIMITING LIABILITY.

See **CARRIERS OF GOODS; CARRIERS OF PASSENGERS; CONNECTING CARRIERS; TICKETS AND FARES.**

LIQUORS.

See **INTERSTATE COMMERCE.**

LIVE WIRES.

See **STREET RAILWAYS.**

LOCATION.

See **CROSSINGS OF RAILROADS.**

LOCOMOTIVES.

See **EMPLOYERS' LIABILITY ACTS.**

LOGGING RAILROADS.

See **FELLOW SERVANTS.**

LOOKOUTS.

See LICENSEES; STREET RAILWAYS.

LOSS OF FREIGHT.

See CONNECTING CARRIERS.

LOSS OF GOODS.

See CARRIERS OF GOODS.

LOSS OF TIME.

See CARRIERS OF PASSENGERS.

MALICE.

See CARRIERS OF PASSENGERS; INJURIES TO PROPERTY.

MANDAMUS.

See RAIROAD COMMISSIONS.

MARRIAGE.

See PERSONAL INJURIES.

MASTER AND SERVANT.

See DAMAGES; EMPLOYERS' LIABILITY ACTS; EVIDENCE; FELLOW SERVANTS; NEGLIGENCE; TRESPASSERS; TRIAL.

Assumption of Risk.

Brakeman did not assume, as matter of law, risk of injury by being struck by crossing gate, while running by side of his engine. *Fearns v. New York Cent. & H. R. R. Co.* (Mass.), 814.

Brakeman did not assume risk of defect in blocking at switch. *Pierson v. Chicago & N. W. Ry. Co.* (Iowa), 332.

Brakeman injured by reason of defective coupling. *Brinkmeier v. Missouri Pac. Ry. Co.* (Kan.), 349.

Brakeman injured by structure near track. *Fearns v. New York Cent. & H. R. R. Co.* (Mass.), 814.

Car repairer's failure to observe rule requiring blue flag or light to be displayed at end of car upon or about which workmen are engaged. *Canadian Pac. Ry. Co. v. Elliott* (C. C. A.), 621.

It could not be charged, as matter of law, that switchman assumed risk from proximity of roof of freight house to top of cars passing under it, in switch yard. *Hawley v. Chicago, B. & Q. Ry. Co.* (C. C. A.), 810.

Mere knowledge of existence and general location of scale box near track. *Texas & Pac. Ry. Co. v. Swearingen* (U. S.), 378.

Obvious differences in foreign cars, such as location of hand grab. *Wood v. Northern Pac. Ry. Co.* (Wash.), 365.

Scale box near track, excerpts from contract of employment were inadmissible to show knowledge of proximity and assumption of risk. *Texas & Pac. Ry. Co. v. Swearingen* (U. S.), 378.

Section man struck by waste matter thrown from engine by fireman. *Swartz v. Great Northern Ry. Co.* (Minn.), 790.

Brutal conduct of watchmen in searching house for stolen ties, master liable because it was committed while acting within scope of their employment. *Lesch v. Great Northern Ry. Co.* (Minn.), 770.

Care required of master to keep tracks in safe condition, to prevent injury to brakeman. *Culver v. South Haven & E. R. Co.* (Mich.), 806.

Care required of railroad to prevent injuries to brakeman from proximity of structure erected for proper purpose at reasonable distances from tracks. *Fearns v. New York Cent. & H. R. R. Co.* (Mass.), 814.

Cleats for skids, sufficiency of evidence of performance of duty to

MASTER AND SERVANT.—Continued.

- furnish material for employees engaged in transferring freight through cars to another car. *Hayes v. New York, N. H. & R. Co. (Mass.)*, 369.
- Complaint, in action for injury to section man, struck by waste matter thrown out by fireman, stated a cause of action. *Swartz v. Great Northern Ry. Co. (Minn.)*, 790.
- Concurring negligence of fellow servant and vice principal rendered master liable for injury to employee. *Virginia & S. W. Ry. Co. v. Bailey (Va.)*, 795.
- Concurring negligence rendered master liable where servant engaged in attaching to a cable logs, which were being dragged by an engine, was injured by negligence of engineer in starting engine, but accident could have been avoided by defendant providing signal for use of engineer. *Conine v. Olympia Logging Co. (Wash.)*, 387.

Contributory Negligence.

- Brakeman was not guilty of, as matter of law, in running into crossing gate, which was out of repair and projected into his line of travel as he was running alongside of an engine, in the evening, in line of his duty. *Fearns v. New York Cent. & H. R. R. Co. (Mass.)*, 814.
- Choosing less safe method of working. *Brinkmeier v. Missouri Pac. Ry. Co. (Kan.)*, 349.
- Custom or usage as to method of rendering service admissible in evidence when determining whether employee was negligent when acting in an emergency. *Pierson v. Chicago & N. W. Ry. Co. (Iowa)*, 332.
- Foot used by brakeman to control drawbar while coupling, question for jury. *Brinkmeier v. Missouri Pac. Ry. Co. (Kan.)*, 349.
- Question for jury where brakeman was injured by reason of defective blocking at switch. *Pierson v. Chicago & N. W. Ry. Co. (Iowa)*, 332.
- Question for jury where switchman was knocked from top of car in switch yard by roof of freight house. *Hawley v. Chicago, B. & Q. Ry. Co. (C. C. A.)*, 810.
- Section hand's own negligence was the proximate cause of his injury, where his foot was caught between a loose tie, lying near track, and car wheel, while he was assisting his foreman in distributing ties along track from a push car. *Fielding v. Chicago, B. & Q. R. Co. (Neb.)*, 769.
- Use of coupling with knowledge of defect. *Brinkmeier v. Missouri Pac. Ry. Co. (Kan.)*, 349.
- Where brakeman went on trip to learn his duties, and was directed to follow the methods pursued by the rest of the crew, evidence was admissible to show that on such instruction trip, another brakeman went between moving cars to uncouple them. *Pierson v. Chicago & N. W. Ry. Co. (Iowa)*, 332.
- Duty to inspect foreign cars, but not bound to warn employees of obvious differences in construction. *Woods v. Northern Pac. Ry. Co. (Wash.)*, 365.

Evidence.

- Customary violation of rule requiring cars undergoing repairs to be protected by lights or flags could not be shown by testimony of witness, who had only worked under a different rule. *Canadian Pac. Ry. Co. v. Elliott (C. C. A.)*, 621.
- Custom or usage as to method of rendering service admissible when determining whether employee was negligent when acting in emergency. *Pierson v. Chicago & N. W. Ry. Co. (Iowa)*, 332.
- Excerpts from contract of employment were inadmissible to show knowledge of proximity of scale box to track and as-

MASTER AND SERVANT.—Continued.

- sumption of risk. *Texas & Pac. Ry. Co. v. Swearingen* (U. S.), 378.
- Expert testimony was not admissible to show cause of derailment of train running around curve, where rails were spread, which resulted in injury to street car conductor, as it was a question for the jury. *Schutz v. Union Ry. Co. of New York City* (N. Y.), 777.
- In action for injuries to fireman, refusal to permit defendant to prove that it was not the duty of a conductor to give his brakeman any detailed instructions to go to the end of cars to which a coupling was to be made was cured by a certain instruction. *Virginia & S. W. Ry. Co. v. Bailey* (Va.), 795.
- Question asked of witness as to whether it would not be the duty of the conductor "to know the exact spot at which the cars had been left to which he was going back to couple" was properly disallowed, in action for injury to fireman, where negligence of conductor in permitting engine to approach cars to which it was to be coupled at a rate of dangerous speed. *Virginia & S. W. Ry. Co. v. Bailey* (Va.), 795.
- In action for injuries to fireman, thrown from his car by impact in coupling cars, evidence was sufficient to sustain verdict for plaintiff. *Virginia & S. W. Ry. Co. v. Bailey* (Va.), 795.
- In action for injury to fireman, thrown from car by impact in coupling cars, instruction that, if the accident was due to certain causes, plaintiff could not recover, was properly refused, as predicated on concurring negligence of conductor, a vice principal, and that of brakeman, a fellow servant. *Virginia & S. W. Ry. Co. v. Bailey* (Va.), 795.
- "Last clear chance" doctrine was not applicable where brakeman was killed by reason of another train running into a switch and against the train which he had entered, in violation of his duty and after he had negligently failed to lock the switch. *Holland v. Seaboard Air Line Ry. Co.* (N. Car.), 787.
- Master liable for torts of servants committed within scope of employment, whether they be negligently or willfully done. *Lesch v. Great Northern Ry. Co.* (Minn.), 770.
- Necessity of designating negligent employee, in action for injury to another employee. *Atchison, etc., Ry. Co. v. Davis* (Kan.), 354.
- Negligence in running train against section hand, insufficiency of evidence. *Helm v. Missouri Pac. Ry. Co.* (Mo.), 324.
- Negligence, sufficiency of complaint in action for injury to section man, caused by fireman throwing out waste matter. *Swartz v. Great Northern Ry. Co.* (Minn.), 790.
- Negligence was a question for jury where brakeman was injured by reason of defective foot guards at switch. *Pierson v. Chicago & N. W. Ry. Co.* (Iowa), 332.
- Notice to company of structural defect in coupling will be inferred. *Brinkmeier v. Missouri Pac. Ry. Co.* (Kan.), 349.
- Not liable on account of failure to use cleats on skids where sufficient material for them was furnished. *Hayes v. New York, N. & H. R. Co.* (Mass.), 369.
- Presumption that section hand will avoid being struck by train. *Helm v. Missouri Pac. Ry. Co.* (Mo.), 324.
- Rule, insufficiency of evidence to show implied abrogation by frequent violation. *Canadian Pac. Ry. Co. v. Elliott* (C. C. A.), 621.
- Safe place to work, duty not performed with respect to locating scale box near track. *Texas & Pac. Ry. Co. v. Swearingen* (U. S.), 378.
- Speed of train by which section hand was struck, insufficiency of evidence. *Helm v. Missouri Pac. Ry. Co.* (Mo.), 324.
- Speed of train was not negligence with respect to section hand struck by it. *Helm v. Missouri Pac. Ry. Co.* (Mo.), 324.
- Where declaration, in action for injury to brakeman, complains only

MASTER AND SERVANT.—Continued.

of defect in track, charge is erroneous in authorizing recovery for defect in coupler. *Culver v. South Haven & E. R. Co.* (Mich.), 806.

MATERIALMEN.

See LIENS.

MATERIALS PROPERLY FURNISHED.

See MASTER AND SERVANT.

MEASURE OF DAMAGES.

See PERSONAL INJURIES.

MEDICAL TESTIMONY.

See PERSONAL INJURIES.

MENTAL DISABILITY.

See CARRIERS OF PASSENGERS.

MENTAL SUFFERING.

See CARRIERS OF PASSENGERS; PERSONAL INJURIES.

MERCHANTS.

See RAILROADS IN STREETS.

MERGER.

See EMINENT DOMAIN.

MILITARY ROADS.

See EMINENT DOMAIN.

MINORS.

See CARRIERS OF PASSENGERS.

MISCARRIAGE.

See CARRIERS OF PASSENGERS.

MISDIRECTING.

See CARRIERS OF PASSENGERS.

MISJOINDER OF CAUSES OF ACTION.

See INJURIES TO PROPERTY.

MISREPRESENTATIONS AS TO FREIGHT RATES.

See CARRIERS OF GOODS.

MISTAKE IN PUNCHING TICKET.

See CARRIERS OF PASSENGERS.

MISTAKES.

See CONNECTING CARRIERS.

MOBS.

See CARRIERS OF PASSENGERS; JUDICIAL NOTICE.

MONEY.

See CARRIERS OF GOODS.

MORAL CHARACTER.

See CARRIERS OF GOODS.

MORTALITY TABLES.

See PERSONAL INJURIES.

MORTIFICATION.

See CARRIERS OF PASSENGERS.

MOTORMEN.

See STREET RAILWAYS.

MOVING CARS.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT.

NEGLIGENCE.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CHILDREN; CONTRIBUTORY NEGLIGENCE; FIRES SET BY LOCOMOTIVES; FRIGHTENING TEAMS; LEASES AND RUNNING POWERS; LICENSEES; MASTER AND SERVANT; STOCK, INJURIES TO; STREET RAILWAYS; TRESPASSERS; WATER AND WATERCOURSES.

Carelessly and negligently synonymous terms. *Southern Ry. Co. v. Horine* (Ga.), 427.

Complaint, in alleging character of defendant's fault, was indefinite because of conflicting theories presented. *Rideout v. Winnebago Traction Co.* (Wis.), 416.

Conflicting theories, error to render judgment on verdict in favor of plaintiff upon the ground of gross negligence and ordinary negligence as well. *Rideout v. Winnebago Traction Co.* (Wis.), 416.

Conflicting theories of complaint, duty of trial court. *Rideout v. Winnebago Traction Co.* (Wis.), 416.

Contribution among wrongdoers, terminal company negligent to one of its employees, in not inspecting car delivered by railroad company, could not enforce contribution from railroad because of latter's like neglect of duty. *Union Stock Yards Co. v. Chicago, etc., R. Co.* (U. S.), 200.

Direction of verdict, when not proper. *Illinois Cent. R. Co. v. Smith* (Miss.), 293.

Error to instruct as to what constitutes. *Augusta Ry. & Electric Co. v. Smith* (Ga.), 16.

Gross negligence does not include ordinary negligence. *Rideout v. Winnebago Traction Co.* (Wis.), 416.

Gross negligence, meaning of term. *Rideout v. Winnebago Traction Co.* (Wis.), 416.

Gross negligence, term involves actual or constructive intent. *Rideout v. Winnebago Traction Co.* (Wis.), 416.

Necessity of designating negligent employee. *Atchison, etc., Ry. Co. v. Davis* (Kan.), 354.

Negligence and willfulness not synonymous terms. *Rideout v. Winnebago Traction Co.* (Wis.), 416.

Not bound to anticipate negligence in another. *Atlanta & W. P. R. Co. v. Lovelace* (Ga.), 150.

Pleading. *Chicago, R. I. & P. Ry. Co. v. O'Donnell* (Neb.), 135.

NEGOTIABILITY.

See BILLS OF LADING.

NEGROES.

See CARRIERS OF PASSENGERS.

NEW CAUSE OF ACTION.

See FIRES SET BY LOCOMOTIVES.

NOISE.

See INJURIES TO PROPERTY.

NONASSIGNABLE DUTIES.

See MASTER AND SERVANT.

NOTICE.

See CARRIERS OF PASSENGERS.

NOTICE OF CLAIM.

See PERSONAL INJURIES.

NOTICE OF DANGER.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT.

NOTICE OF DEFECTS.

See MASTER AND SERVANT.

NOTICE TO CARRIER.

See CARRIERS OF GOODS.

NUISANCES.

See INJURIES TO PROPERTY; STREET RAILWAYS.

OBLIGATIONS OF CONSTITUENT CORPORATIONS.

See RAILROADS.

OBSTRUCTIONS.

See RAILROADS IN STREETS; STREET RAILWAYS.

OBVIOUS DANGERS.

See MASTER AND SERVANT.

OPERATION OF RAILROADS.

See INJURIES TO PROPERTY; STREET RAILWAYS.

ORDINANCES.

See CARRIERS OF PASSENGERS; CROSSINGS; INJURIES TO PROPERTY; RAILROADS IN STREETS.

ORIGIN.

See FIRES SET BY LOCOMOTIVES.

ORIGINAL JURISDICTION.

See EMINENT DOMAIN.

OTHER FIRES.

See FIRES SET BY LOCOMOTIVES.

OVERFLOWS.

See WATER AND WATERCOURSES.

OVERHEAD STRUCTURES.

See MASTER AND SERVANT

OVERLAPPING AT CURVE.

See CARRIERS OF PASSENGERS.

OWNERSHIP.

See CARRIERS OF GOODS.

PACKAGES TAMPERED WITH.

See CARRIERS OF GOODS.

PAPERS.

See BAGGAGE.

PAROL EVIDENCE.

See STATIONS AND DEPOTS; TICKETS AND FARES.

PARTIAL LOSS.

See CARRIERS OF LIVE STOCK.

PARTICIPATION IN WRONG.

See CARRIERS OF PASSENGERS.

PARTIES.

See CORPORATIONS.

PASSENGERS.

See CARRIERS OF PASSENGERS; STATIONS AND DEPOTS.

PASSING CARS.

See CARRIERS OF PASSENGERS.

PASSING OF TITLE.

See CARRIERS OF GOODS.

PATHS.

See LICENSEES.

PAYING FARE.

See CARRIERS OF PASSENGERS.

PECUNIARY LOSS.

See DEATH BY WRONGFUL ACT.

PEDESTRIANS.

See STREET RAILWAYS.

PENAL STATUTES.

See CARRIERS OF GOODS; EMPLOYERS' LIABILITY ACTS; LEASES AND RUNNING POWERS.

PERISHABLE FREIGHT.

See CARRIERS OF GOODS.

PERMANENT INJURIES.

See INJURIES TO PROPERTY.

PERSONAL INJURIES.

See CARRIERS OF PASSENGERS; CROSSINGS; EVIDENCE; LICENSEES; MASTER AND SERVANT; TRESPASSERS; TRIAL.

Damages.

Future suffering must be reasonably certain to be the result of injuries. *Chicago & M. Electric Ry. Co. v. Ullrich* (Ill.), 405. Measure of damages always a question for jury. *Powell v. Nevada, C. & O. Ry.* (Nev.), 168.

Mental anguish apart from physical suffering, measure of damages always a question for jury. *Powell v. Nevada, C. & O. Ry.* (Nev.), 168.

Verdict for \$6,000 not excessive for impairment of mind and other injuries. *Powell v. Nevada, C. & O. Ry.* (Nev.), 168.

Evidence.

Life tables admissible where injuries were claimed to be permanent. *Virginia & S. W. Ry. Co. v. Bailey* (Va.), 795.

Medical testimony, based on hypothetical question, that certain injury was caused of disease. *Redmon v. Metropolitan St. Ry. Co.* (Mo.), 248.

PERSONAL INJURIES—Continued.

- Res gestæ, statements by injured person to physician, made some-time after accident, as to cause of injury, were not. *Shade's Adm'r v. Covington-Cincinnati E. R. & T. & B. Co.* (Ky.), 183.
- Marriage, necessity of proving validity, in action by husband for injuries to wife. *Tozier v. Haverhill & A. St. Ry. Co.* (Mass.), 238.
- Notice of claim, company not estopped to deny waiver of other notice than that served upon its claim agent, by the correspondence of the latter. *Smith v. Chicago, M. & St. P. Ry. Co.* (Wis.), 180.
- Notice of claim, service on railroad claim agent insufficient, under Wis. Rev. St. 1898, § 4222, subd. 5. *Smith v. Chicago, M. & St. P. Ry. Co.* (Wis.), 180.
- Where the evidence was conclusive that at the time of trial plaintiff had not recovered from her injuries, it was proper to instruct on future suffering. *Chicago & M. Electric Ry. Co. v. Ullrich* (Ill.), 405.

PHYSICAL DISABILITY.

See CARRIERS OF PASSENGERS.

PLACE OF ENTRY.

See STOCK, INJURIES TO.

PLATFORMS.

See STATIONS AND DEPOTS.

PLEADING.

See FIRES SET BY LOCOMOTIVES; NEGLIGENCE;
STOCK, INJURIES TO.

PLEADING AND PROOF.

See MASTER AND SERVANT.

POLICEMAN.

See TRESPASSERS.

POSTED RATES.

See CARRIERS OF GOODS.

POST ROADS.

See EMINENT DOMAIN.

PRELIMINARY INJUNCTIONS.

See RAILROADS.

PREPARED STATEMENTS.

See TRIAL.

PRESUMPTION OF DUE CARE BY DECEASED.

See CROSSINGS.

PRESUMPTION OF NEGLIGENCE.

See ACCIDENTS ON TRACK; STOCK, INJURIES TO;
TRESPASSERS.

PRESUMPTION OF OWNERSHIP.

See CARRIERS OF GOODS.

PRESUMPTIONS.

See CONTRIBUTORY NEGLIGENCE; LICENSEES; MAS-
TER AND SERVANT; STREET RAILWAYS; TICKETS
AND FARES.

PRINTED CONDITIONS.

See CONNECTING CARRIERS; TICKETS AND FARES.

PRIVATE RAILROADS.

See FELLOW SERVANTS.

PROCLAMATIONS.

See CARRIERS OF PASSENGERS

PROFITS.

See BAGGAGE.

PROPERTY RIGHTS.

See INJURIES TO PROPERTY.

PROSPECTIVE PASSENGERS.

See CARRIERS OF PASSENGERS.

PROTECTION OF PASSENGERS.

See CARRIERS OF PASSENGERS.

PROVINCE OF COURTS.

See RAILROAD COMMISSIONS.

PROXIMATE CAUSE.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CONTRIBUTORY NEGLIGENCE; STREET RAILWAYS.

PROXIMITY OF CARS.

See CARRIERS OF PASSENGERS.

PUBLIC INTEREST.

See EMINENT DOMAIN.

PUBLIC USE.

See EMINENT DOMAIN.

PUNCHING TICKETS.

See CARRIERS OF PASSENGERS.

PUNITIVE DAMAGES.

See CARRIERS OF PASSENGERS.

PURCHASERS.

See RECEIVERS.

RAILROAD COMMISSIONS.

See CARRIERS OF GOODS.

Rates, when mandamus will be issued to enforce as not unreasonable. State ex rel. Ellis v. Atlantic Coast Line R. Co. (Fla.), 286.

Reasonableness of specific rate, when mandamus will be issued to enforce rate as not being such a one as to deprive carrier of property without due process of law. State ex rel. Ellis v. Atlantic Coast Line R. Co. (Fla.), 286.

When specified rate is fixed by commission, courts are not concerned whether such rate may be unnecessary or merely speculative. State ex rel. Ellis v. Atlantic Coast Line R. Co. (Fla.), 286.

RAILROAD POLICE.

See TRESPASSERS.

RAILROADS.

- See CORPORATIONS; EMINENT DOMAIN; INJURIES TO PROPERTY; LEASES AND RUNNING POWERS; LIENS.
- Application of N. Car. Priv. Laws 1901, p. 463, c. 168, conferring authority on the Seaboard Air Line Ry. Co. to consolidate with any railroad or transportation company in the United States. *Spencer v. Seaboard Air Line Ry. Co. (N. Car.)*, 656.
- Consolidation, assumption of obligations of each constituent corporation, whether arising ex contractu or ex delicto. *Kansas City-Leavenworth R. Co. v. Langley (Kan.)*, 433.
- Consolidation under N. Car. Priv. Laws 1901, p. 463, c. 168, authorizing payment of value of dissenting stock, stockholder not entitled to rely on inhibition of the federal constitution as to the impairment of the obligation of a contract to defeat a consummated consolidation under the act, since such an acquisition of dissenting stock is an exercise of the right of eminent domain. *Spencer v. Seaboard Air Line Ry. Co. (N. Car.)*, 656.
- Consolidation under N. Car. Priv. Laws 1901, p. 463, c. 168, providing for assessing and paying value of dissenting stock, dissenting stockholder, who had been guilty of laches in pursuing her equitable right to appeal to the courts, was fully protected. *Spencer v. Seaboard Air Line Ry. Co. (N. Car.)*, 656.
- Laches of dissenting stockholder prevented her from invoking power of court to declare consolidation under N. Car. Priv. Laws 1901, p. 463, c. 168, providing for assessing and paying value of dissenting stock, invalid. *Spencer v. Seaboard Air Line Ry. Co. (N. Car.)*, 656.
- N. Car. Priv. Laws 1901, p. 463, c. 168, empowering certain railroads to consolidate, imposes no duty or obligation on such companies or their stockholders. *Spencer v. Seaboard Air Line Ry. Co. (N. Car.)*, 656.
- That a company, in relocating its road, proposed to occupy a public road, close crossings, and substitute others, did not warrant the granting of a preliminary injunction. *Baldwin Tp. v. Baltimore & O. R. Co. (Pa.)*, 134.

RAILROADS IN STREETS.

See ACCIDENTS ON TRACKS; STREET RAILWAYS.

Damages.

- Abutting owner could recover for obstruction of ingress and egress caused by erection of railroad viaduct in street. *Camden Interstate Ry. Co. v. Smiley (Ky.)*, 94.
- Depreciation in value of business property from obstruction of street affording access to it, caused by railway embankment, recoverable. *Harrington v. Iowa Cent. Ry. Co. (Iowa)*, 97.
- Effect of occupation of private property, prior to assessment and payment of damages, and subsequent default of railroad company, where company acted under agreement with city, authorized by act of 1895 of Connecticut, providing for the abolition of grade crossings. *Vincent Bros. v. New York, etc., R. Co. (Conn.)*, 587.
- Elements of damages for temporary occupation of street in prosecuting work, where a railroad is acting under acts of 1895 of Connecticut and an agreement with city, in the abolition of grade crossings. *Vincent Bros. v. New York, etc., R. Co. (Conn.)*, 587.
- Excessive verdict for obstruction of ingress and egress, occasioned by erection of railroad viaduct in street. *Camden Interstate Ry. Co. v. Smiley (Ky.)*, 94.
- In action for injuries from temporary occupation of street by railroad engaged in abolishing grade crossings, it was error to allow merchant items for extra help and the extra price paid for produce to an amount exceeding the value of plaintiff's premises. *Vincent Bros. v. New York, etc., R. Co. (Conn.)*, 587.

RAILROADS IN STREETS—Continued.

Not error to permit amendment of petition, after dissolution of injunction, in action for injuries to abutting property from erection of railroad viaduct in street. *Camden Interstate Ry. Co. v. Smiley* (Ky.), 94.

Ordinance did not show that it did not vacate street but only gave the railroad the right to use it. *Harrington v. Iowa Cent. Ry. Co.* (Iowa), 97.

Recovery for special injury from obstruction of street by railway embankment prevented by prior vacation of street for railroad purposes. *Harrington v. Iowa Cent. Ry. Co.* (Iowa), 97.

Where a city, under authority of Iowa Code, § 751, vacated a street for railroad purposes, one whose property was specially injured by a railroad embankment obstructing travel could not recover of the railroad company. *Harrington v. Iowa Cent. Ry. Co.* (Iowa), 97.

"RAILROAD WORK."

See EMPLOYERS' LIABILITY ACTS.

RATES.

See RAILROAD COMMISSIONS.

RATIFICATION OF CONTRACT.

See CARRIERS OF GOODS.

REAL ESTATE.

See INJURIES TO PROPERTY.

REBUTTAL.

See STOCK, INJURIES TO.

RECEIPTS.

See CARRIERS OF GOODS.

RECEIVERS.

See CONNECTING CARRIERS.

Action for death of passenger, killed while road was operated by receiver, was maintainable against receiver after his discharge. *Denver & R. G. R. Co. v. Gunning* (Colo.), 842.

Authority of receivers' general agent to make special agreement to forward a through shipment by steamer of connecting carrier sailing on designated day. *Northern Pac. Ry. Co. v. American Trading Co.* (U. S.), 744.

Purchaser at foreclosure sale could be sued in state court in action for death of passenger killed while railroad was operated by federal receiver. *Denver & R. G. R. Co. v. Gunning* (Colo.), 842.

Purchaser at foreclosure sale properly joined as defendant in action for death of passenger killed while railroad was operated by receiver. *Denver & R. G. R. Co. v. Gunning* (Colo.), 842.

The making of special agreement to forward through shipment by steamer of connecting carrier sailing on designated day is within authority of receivers appointed, in a suit to foreclose a railway mortgage, to continue to carry on railroad business. *Northern Pac. Ry. Co. v. American Trading Co.* (U. S.), 744.

RECEIVING PASSENGERS.

See CARRIERS OF PASSENGERS.

RECKLESSNESS.

See TRESPASSERS.

RECURRENT INJURIES.

See INJURIES TO PROPERTY.

REFUSAL TO GRANT CLEARANCE.

See CONNECTING CARRIERS.

RELATION.

See CARRIERS OF PASSENGERS.

RELOCATION.

See RAILROADS.

REMARKS OF COUNSEL.

See TRIAL.

REMOVAL OF CAUSES.

See EMINENT DOMAIN.

REPAIRS.

See CARRIERS OF PASSENGERS.

RES GESTÆ.

See CARRIERS OF PASSENGERS; PERSONAL INJURIES.

"RESTRAINT" OF CIVIL AUTHORITIES.

See CONNECTING CARRIERS.

REVOCABLE LICENSE.

See SPURS AND SIDETRACKS.

RIDING IN CABOOSE.

See LICENSEES.

RIDING IN DANGEROUS PLACE.

See CARRIERS OF PASSENGERS.

RIDING ON PLATFORM.

See CARRIERS OF PASSENGERS.

RIDING ON RUNNING BOARD.

See CARRIERS OF PASSENGERS.

RIGHT OF WAY.

See CARRIERS OF PASSENGERS; EMINENT DOMAIN; INJURIES TO PROPERTY; STATIONS AND DEPOTS.

No rights were acquired by railroad in the land outside of embankment of roadbed, under permission of owner to build road. *Louisville & N. R. Co. v. Smith* (Ala.), 597.

One who, without any claim of right, enters upon railroad premises or right of way cannot justify his possession by showing that his occupancy does not interfere with the actual operation of the railroad. *Kansas & C. P. Ry. Co. v. Burns* (Kan.), 132.

Where a contract between a railroad and a landowner for conveyance of land to railroad was executory and within statute of frauds, mere entry on the land by railroad, with the consent of the owner, and excavation of small quantity of earth, was not sufficient to warrant specific performance at suit of vendee. *Wisconsin & M. Ry. Co. v. McKenna* (Mich.), 119.

ROUND TRIP TICKETS.

See TICKETS AND FARES.

RULE LIMITING SPEED.

See ACCIDENTS ON TRACK.

RULES.

See CARRIERS OF PASSENGERS; LICENSEES; MASTER AND SERVANT.

STATIONS AND DEPOTS—Continued.

There was a valid contract for the location of a station on land adjoining plaintiff's land, and he was entitled to damages for abandonment of station as a passenger station. *St. Louis & N. A. R. Co. v. Crandall* (Ark.), 837.

Where railroad contracted with landowner to erect station at point without corporate limits, the fact that it was thereafter required by law to erect a station within corporate limits did not relieve it from liability to the landowner for moving the station. *St. Louis & N. A. R. Co. v. Crandall* (Ark.), 837.

STATUTE OF FRAUDS.

See RIGHT OF WAY.

STATUTES.

See EMPLOYERS' LIABILITY ACTS; STATIONS AND DEPOTS.

STEALING RIDES.

See TRESPASSERS.

STOCK AND STOCKHOLDERS.

See EMINENT DOMAIN; RAILROADS.

STOCK, INJURIES TO.

See EVIDENCE; FENCES.

Liability for killing fixed by place of entry through track fence. *Chicago, B. & Q. R. Co. v. Sevcek* (Neb.), 185.

Negligence, sufficiency of petition. *Central of Georgia Ry. Co. v. Bagley* (Ga.), 172.

Peremptory charge for defendant was warranted by circumstantial evidence and testimony of engineer, where neither plaintiff nor any of his witnesses saw accident. *Alabama & V. R. Co. v. Boyles* (Miss.), 431.

Presumption of negligence from accident rebutted. *Western & A. R. Co. v. Clark* (Ga.), 440.

Presumption of negligence from accident was not rebutted, and verdict for plaintiff was warranted by the evidence. *Central of Georgia Ry. Co. v. McWhorter* (Ga.), 470.

Railroad was not excused from fencing at place of accident, and was liable for killing plaintiff's stock. *Chicago, B. & Q. R. Co. v. Sevcek* (Neb.), 185.

STOCK SOLD FOR DECLARED VALUE.

See CARRIERS OF LIVE STOCK.

STOP, LOOK AND LISTEN.

See CROSSINGS.

STOPPAGE IN TRANSITU.

See BILLS OF LADING.

STOPPING CARS.

See CARRIERS OF PASSENGERS.

STOPPING PLACES.

See STATIONS AND DEPOTS.

STRANGERS.

See CARRIERS OF PASSENGERS.

STREET RAILWAYS.

See ABUTTERS; CARRIERS OF PASSENGERS; CHILDREN; TICKETS AND FARES.

Additional servitude, interurban electric railway, carrying passen-

STREET RAILWAYS—Continued.

- gers' baggage, light express matter, and mail is not, so as to entitle abutting owners to compensation. *Mordhurst v. Ft. Wayne & S. W. Traction Co. (Ind.)*, 122.
- Additional servitude, railway was not, nor did its construction and operation entitle abutting owners to maintain ejectment. *Budd v. Camden Horse R. Co. (N. J.)*, 116.
- Additional servitude, street railway was not, although, in original laying out of street, mere easement, and not the fee, was taken. *Hester v. Durham Traction Co. (N. Car.)*, 830.
- Additional servitude, street railway was not, and abutting owners not entitled to compensation. *Mordhurst v. Ft. Wayne & S. W. Traction Co. (Ind.)*, 122.
- Collision between car and other vehicle, proximate cause where failure to maintain lookout and contributory negligence. *Birmingham Ry., Light & Power Co. v. Brantley (Ala.)*, 191.
- Contributory Negligence.**
- Girl was not guilty of, as matter of law, in attempting to alight to hold her horse, which was frightened by street car. *McVean v. Detroit United Ry. (Mich.)*, 464.
- Degree of care required to prevent live electric wires from injuring pedestrians. *Metropolitan St. Ry. Co. v. Gilbert (Kan.)*, 428.
- Duty of motorman upon seeing that a horse drawing a vehicle is frightened. *McVean v. Detroit United Ry. (Mich.)*, 464.
- Electric railway company liable for special injuries to abutting property caused by negligence in construction or operation of road. *Mordhurst v. Ft. Wayne & S. W. Traction Co. (Ind.)*, 122.
- Facts were insufficient to show that abutter's right of egress and ingress was damaged by curve constructed to transfer cars from one track to another. *Hester v. Durham Traction Co. (N. Car.)*, 830.
- Mere anticipation of breach of company's contract with city, and of consequent injuries to abutting property, did not entitle abutter to enjoin construction of railway. *Mordhurst v. Ft. Wayne & S. W. Traction Co. (Ind.)*, 122.
- Presumption that company would perform its contract with city sufficient to prevail against mere allegation to the contrary in complaint, in action to enjoin construction of railway. *Mordhurst v. Ft. Wayne & S. W. Traction Co. (Ind.)*, 122.
- The carriage of light express matter, passengers' baggage, and mail matter upon street cars does not constitute a ground of complaint on part of abutting lot owners. *Mordhurst v. Ft. Wayne & S. W. Traction Co. (Ind.)*, 122.

STREETS AND HIGHWAYS.

See ABUTTERS; EMINENT DOMAIN; RAILROADS IN STREETS.

Title to land upon vacation of street. *Harrington v. Iowa Cent. Ry. Co. (Iowa)*, 97.

STRIKES.

See CARRIERS OF PASSENGERS; JUDICIAL NOTICE.

STRUCTURES NEAR TRACK.

See MASTER AND SERVANT.

SUBCONTRACTORS.

See LIENS.

SUBSEQUENT CONSEQUENCES.

See CARRIERS OF PASSENGERS.

SUBSEQUENT PURCHASERS.

See INJURIES TO PROPERTY.

SUPPLIES.

See LIENS.

SWITCHES.

See MASTER AND SERVANT; STREET RAILWAYS.

SYNONYMOUS TERMS.

See NEGLIGENCE.

TAXATION.

Bridge approach, consisting of elevated tracks, embankment and viaduct, constructed on land purchased by railroad for right of way, constituted railroad track, under Illinois statute. *People ex rel. Roche v. Illinois Cent. R. Co. (Ill.)*, 825.

TAX LISTS.

See EMINENT DOMAIN.

TEARING DOWN PROPERTY.

See INJURIES TO PROPERTY.

TELEGRAPHS AND TELEPHONES.

See EMINENT DOMAIN.

TEMPORARY OCCUPATION. •

See RAILROADS IN STREETS.

TERMINAL FACILITIES.

See INJURIES TO PROPERTY.

TERMINAL YARDS.

See INJURIES TO PROPERTY.

TERMINATION OF LIABILITY.

See CARRIERS OF PASSENGERS.

TICKET AGENTS.

See CARRIERS OF PASSENGERS.

TICKETS AND FARES.

See CARRIERS OF PASSENGERS; LEASES AND RUNNING POWERS.

Connecting carrier's responsibility where sale of coupon ticket for transportation over own and connecting lines. *Pennsylvania Co. v. Loftis (Ohio)*, 850.

Duty of passengers to read printed conditions. *Dagnall v. Southern Ry. Co. (S. Car.)*, 59.

Evidence as to passenger's knowledge of printed conditions on ticket and proper construction of contract of carriage was properly excluded, in action for ejection of passenger. *Dagnall v. Southern Ry. Co. (S. Car.)*, 59.

Lessee of street railway bound, under section 104, c. 676, p. 1406, Laws 1892 of New York, to carry any passenger desiring to make one continuous trip to any portion of any railroad embraced within lease for a single fare. *O'Reilly v. Brooklyn Heights R. Co. (N. Y.)*, 716.

Parol evidence competent to prove, aside from ticket sold, contract between carrier and passenger. *Pennsylvania Co. v. Loftis (Ohio)*, 850.

Presumption that carrier, selling coupon ticket good over its own and connecting lines, acted as agent of connecting carriers with respect to coupons good over connecting lines. *Pennsylvania Co. v. Loftis (Ohio)*, 850.

Round-trip ticket, containing provisions that it shall be used only

TICKETS AND FARES—Continued.

by the original holder whose signature it bears, but in fact not signed by anyone, which is sold with the express understanding that it shall be used by A. in going to, and by B. in returning from, the place of destination, is not void when presented by B. upon such return passage, after having been used by A. for the first part of the journey. *Jevons v. Union Pac. R. Co. (Kan.)*, 679.

Where passenger's attention was not called to limitations on ticket, he is entitled to ride on ticket, for which he paid full fare, at any time. *Dagnall v. Southern Ry. Co. (S. Car.)*, 59.

TIME.

See CARRIERS OF PASSENGERS.

TIME LIMIT.

See TICKETS AND FARES.

TIME-SERVICE SYSTEM.

See DAMAGES.

TIME TABLE.

See CARRIERS OF PASSENGERS.

TITLE.

See CARRIERS OF GOODS.

TORTS OF SERVANTS.

See MASTER AND SERVANT.

TRACKS.

See LICENSEES; MASTER AND SERVANT; TAXATION.

TRAFFIC.

See INJURIES TO PROPERTY.

TRAINS.

See INJURIES TO PROPERTY; LICENSEES.

TRANSFER.

See BILLS OF LADING; TICKETS AND FARES.

TRANSFERRING FREIGHT.

See MASTER AND SERVANT.

TRANSFERS.

See TICKETS AND FARES.

TRAVELING SALESMEN.

See BAGGAGE.

TRESPASS.

See INJURIES TO PROPERTY.

TRESPASSERS.

See LICENSEES.

Assault upon intruder upon premises by trainmaster not acting within scope of employment did not render company liable. *Central of Georgia Ry. Co. v. Morris (Ga.)*, 391.

Care due trespasser on track. *Gregory v. Wabash R. Co. (Iowa)*, 457; *Kendrick v. Seaboard Air Line Ry. (Ga.)*, 175.

TRESPASSERS—Continued.

Care required of trainmen. *Manning v. Illinois Cent. R. Co. (Ky.)*, 178.

Duty to trespassers on tracks. *Dotta v. Northern Pac. Ry. Co. (Wash.)*, 146.

Evidence.

In action for shooting of ejected trespasser by carrier's employee it was proper to permit such employee to testify that he held a commission as policeman from state, and to produce and read it. *Deck v. Baltimore & O. R. Co. (Md.)*, 340.

Not error to permit witness to state whether, if it had been daylight, he could have seen a certain city from the place where he was ejected from train. *Deck v. Baltimore & O. R. Co. (Md.)*, 340.

Not error to refuse to permit defendant to impeach plaintiff's witness by asking witness what there was in his record or standing that led defendant to arrest him at time of shooting. *Deck v. Baltimore & O. R. Co. (Md.)*, 340.

Trainmen's testimony as to when they first saw trespasser on track not conclusive. *Gregory v. Wabash R. Co. (Iowa)*, 457.

In action against railroad police officer for shooting plaintiff, after ejecting him from train, where recovery was sought for reckless conduct, requested instruction that defendant must have shot plaintiff "intentionally" was erroneous. *Deck v. Baltimore & O. R. Co. (Md.)*, 340.

"Last clear chance" theory, when applicable. *Dotta v. Northern Pac. Ry. Co. (Wash.)*, 146.

Plaintiff was trespasser on railroad trestle. *Dotta v. Northern Pac. Ry. Co. (Wash.)*, 146.

Presumption of negligence created by statute not sufficiently overcome to warrant nonsuit, in action for killing trespasser on track. *Kendrick v. Seaboard Air Line Ry. (Ga.)*, 175.

Shooting of ejected trespasser by employee, sufficiency of evidence. *Deck v. Baltimore & O. R. Co. (Md.)*, 340.

Shooting of trespasser after ejection, burden of proof not on plaintiff to show that employee was, at the time of the shooting, attending to defendant's business. *Deck v. Baltimore & O. R. Co. (Md.)*, 340.

Shooting of trespasser after ejection, defendant could not escape liability because there was no evidence of express authority to do the shooting, or of subsequent ratification. *Deck v. Baltimore & O. R. Co. (Md.)*, 340.

Shooting of trespasser by servant after ejection, question for jury whether servant acted as commissioned officer of the state or within scope of his employment by defendant. *Deck v. Baltimore & O. R. Co. (Md.)*, 340.

Wanton and willful negligence to trespasser on track not necessary elements to render company liable for his death. *Gregory v. Wabash R. Co. (Iowa)*, 457.

Wantonness, insufficiency of evidence of where trespasser on trestle was injured. *Dotta v. Northern Pac. Ry. Co. (Wash.)*, 146.

TRESTLES.

See TRESPASSERS.

TRIAL.

In an action for injury to an alighting passenger, remarks of counsel for plaintiff to the effect that defendant's servants would have handled a car load of steers with more care than they did plaintiff was not ground for reversal. *West v. St. Louis Southwestern Ry. Co. (Mo.)*, 855.

Remarks of counsel, in negligence action, as to consequences of refusal of railroad employee to sign statement prepared by company, whether erroneous. *Illinois Cent. R. Co. v. Jolly (Ky.)*, 375.

TROLLEY WIRES.

See CARRIERS OF PASSENGERS.

TUNNELS.

See INJURIES TO PROPERTY.

USAGE OF OTHER COMPANIES.

See FENCES.

USE OF PROPERTY.

See INJURIES TO PROPERTY.

VACATION.

See STREETS AND HIGHWAYS.

VACATION OF STREETS.

See RAILROADS IN STREETS.

VALIDITY OF CONTRACT.

See STATIONS AND DEPOTS.

VALUATION OF PROPERTY.

See CARRIERS OF LIVE STOCK.

VALUE OF LAND.

See EMINENT DOMAIN.

VALUE OF LIFE.

See DEATH BY WRONGFUL ACT.

VENDOR AND VENDEE.

See CARRIERS OF GOODS; RECEIVERS.

VERBAL AGREEMENTS.

See TICKETS AND FARES.

VIADUCTS.

See RAILROADS IN STREETS.

VIBRATION.

See INJURIES TO PROPERTY.

VICE PRINCIPALS.

See FELLOW SERVANTS.

VIOLATION OF RULES.

See MASTER AND SERVANT.

WAIVER.

See PERSONAL INJURIES.

WAIVER OF PENALTIES.

See LEASES AND RUNNING POWERS.

WAIVER OF RULES.

See LICENSEES; MASTER AND SERVANT.

WANTONNESS.

See CARRIERS OF PASSENGERS; CHILDREN; TRESPASSERS.

WAR.

See CONNECTING CARRIERS.

WARNINGS AND INSTRUCTIONS.

See MASTER AND SERVANT.

WASTE MATTER.

See FELLOW SERVANTS; MASTER AND SERVANT.

WATCHES.

See DAMAGES.

WATCHMEN.

See FELLOW SERVANTS.

WATER AND WATERCOURSES.

Overflow caused by insufficiency of railroad culvert, liability. *Uhl v. Ohio River R. Co. (W. Va.), 608.*

WAYS TO STATIONS.

See STATIONS AND DEPOTS.

WEATHER CONDITIONS.

See FIRES SET BY LOCOMOTIVES.

WHISTLE.

See CHILDREN; FRIGHTENING TEAMS.

WHO ARE LICENSEES.

See LICENSEES.

WHO ARE PASSENGERS.

See CARRIERS OF PASSENGERS.

WHO ARE TRESPASSERS.

See TRESPASSERS.

WILLFULNESS.

See CARRIERS OF GOODS; CARRIERS OF PASSENGERS; MASTER AND SERVANT; NEGLIGENCE; TRESPASSERS.

WINDOWS.

See CARRIERS OF PASSENGERS.

WIRES.

See CARRIERS OF PASSENGERS; STREET RAILWAYS.

WITNESSES.

See CARRIERS OF GOODS; CARRIERS OF PASSENGERS; EVIDENCE; TRESPASSERS.

WOMAN PUT OFF AT WRONG STATION.

See CARRIERS OF PASSENGERS.

WORK TRAINS.

See LICENSEES.

WRECKING TRAINS.

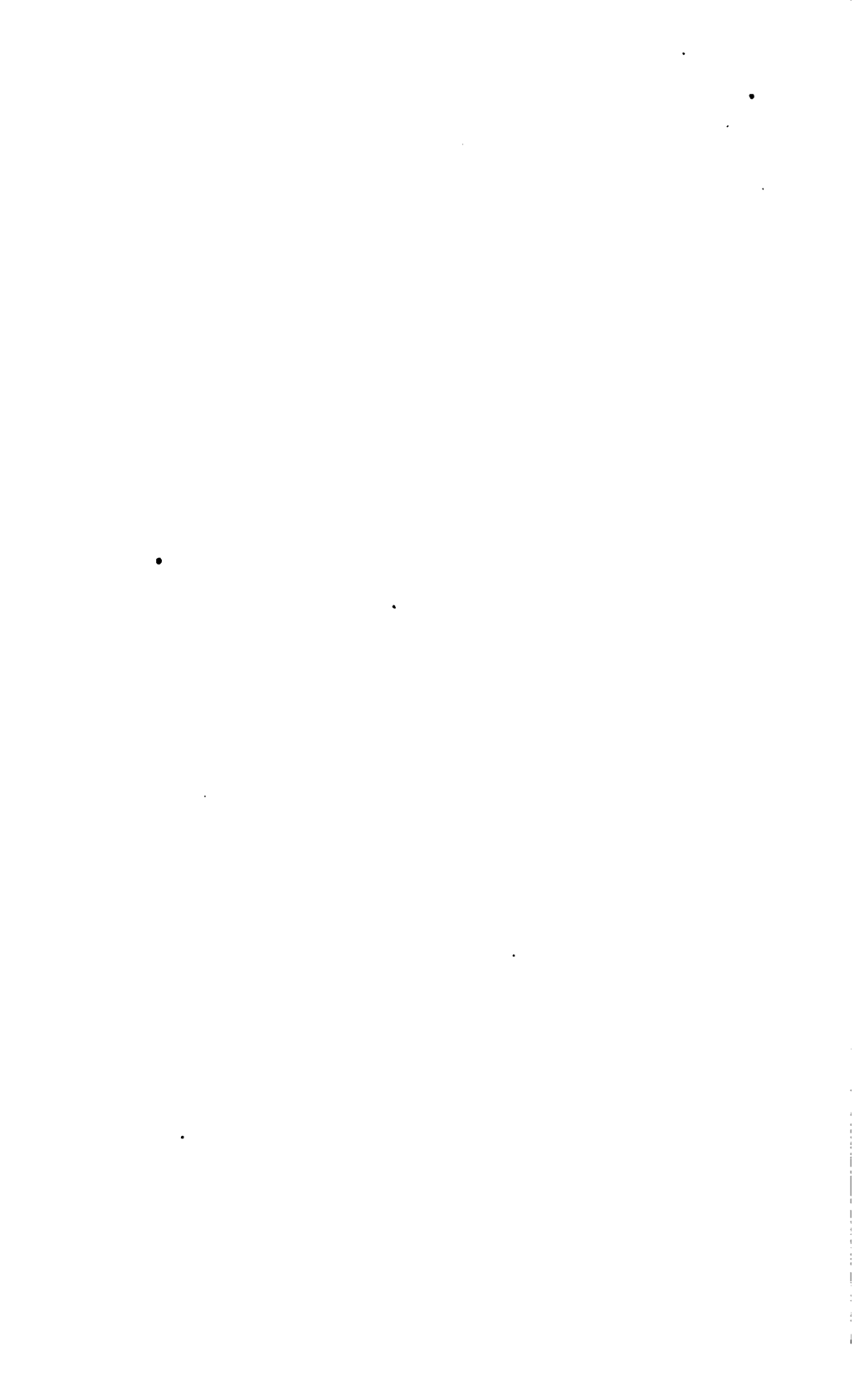
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WRONG STATION.

See CARRIERS OF PASSENGERS.









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